TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 734

THE UNITED STATES OF AMERICA

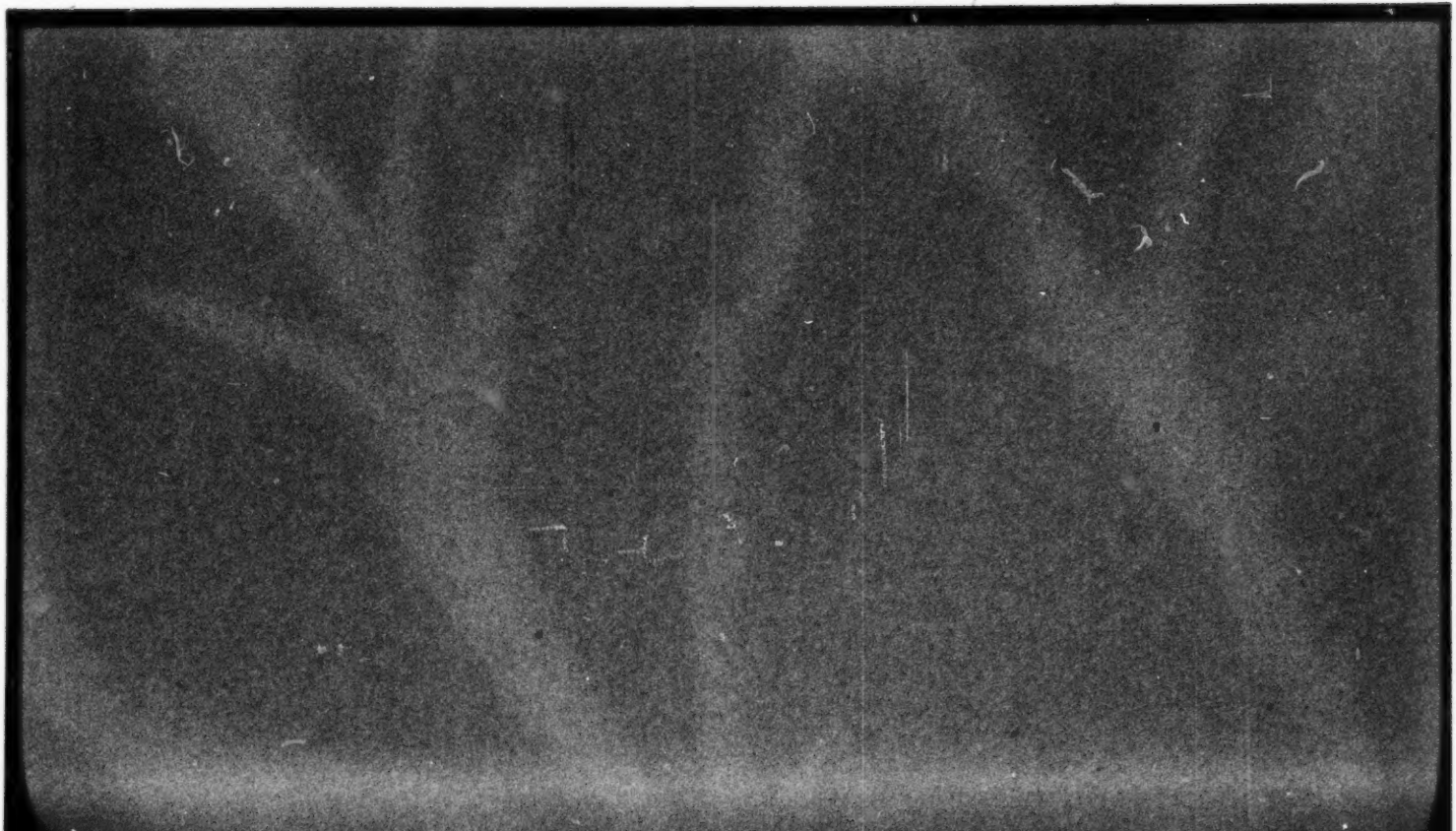
vs.

GLEN MURRAY

ON CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED OCTOBER 24, 1927

(33846)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 394

THE UNITED STATES OF AMERICA

vs.

GLEN MURRAY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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A

Supreme Court of the United States

Order to send up entire record and cause

October 27, 1927

It is now here ordered by this court, in accordance with section 239 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936), that the entire record in this cause be certified to this court so that the whole matter in controversy may be considered by this court; and the cause is hereby assigned for argument on Monday, November 21st next, after the cases heretofore assigned for that day, to be heard with case No. 539, Frederick A. Cook, petitioner, vs. The United States of America, should the court grant the petition for a writ of certiorari now pending in the latter case.

B [Caption omitted.]

United States District Court,
District of Nebraska,
Omaha Division.

United States of America vs. Glen Murray	Case No. 4601 Criminal

Be It Remembered, That on the dates hereinafter shown, certain papers were filed and record made and entered in the above entitled matter, which is in the words and figures following, to-wit:

1

Information.

In the District Court of the United States, District of Nebraska, Omaha Division.

United States of America, Plaintiff, vs. Glen Murray and R. H. Schaefer, first, real and true name unknown, Defendants.	Number 4601 Criminal.

James C. Kinsler, United States Attorney, by Andrew C. Scott, Assistant United States Attorney for the District of Nebraska, who for the United States in this behalf prosecutes, comes into court in his own proper person and gives the court to understand and be informed, that said Glen Murray and R. H. Schaefer, first, real and true name unknown, heretofore, to wit, on or about the 17th day of July, 1926, in the Soft Drink Bar and Lunch Room located at 4942 South 26th street, in the city of Omaha, county of Douglas, in the Omaha Division of the District of Nebraska, then and there being, did then and there unlawfully, wilfully and knowingly sell to Charles Campbell, certain intoxicating liquor, to-wit, 3 drinks of alcohol, fit for beverage purposes, without first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Second Count.

And the said United States Attorney, who prosecutes for the United States as aforesaid, further gives the Court to

understand and be informed, that said Glen Murray and R. H. Schaefer, first, real and true name unknown, heretofore, to wit, on or about the 20th day of July, 1926, in the Soft Drink Bar and Lunch Room located at 4942 South 26th street, in the City of Omaha, County of Douglas, in the Omaha Division of the District of Nebraska, then and there being, did then and there unlawfully, willfully, and knowingly sell to M. A. Wright, certain intoxicating liquor, to wit, 4 drinks of moonshine whiskey, containing more than one-half of one per cent of alcohol by volume, and fit for beverage purposes, without first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

2

Third Count

And the said United States Attorney, who prosecutes for the United States as aforesaid, further gives the Court to understand and be informed, that said Glen Murray and R. H. Schaefer, first, real and true name unknown, heretofore, to wit, on or about the 20th day of July, 1926, in the Soft Drink Bar and Lunch Room located at 4942 South 26th street, in the City of Omaha, County of Douglas, in the Omaha Division of the District of Nebraska, then and there being, did then and there unlawfully, willfully and knowingly sell to Charles Campbell certain intoxicating liquor, to wit, 4 drinks of moonshine whiskey, containing more than one-half of one per cent of alcohol by volume, and fit for beverage purposes, without first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Fourth Count.

And the said United States Attorney, who prosecutes for the United States as aforesaid, further gives the Court to understand and be informed, that said Glen Murray and R. H. Schaefer, first, real and true name unknown, heretofore, to wit, on or about the 20th day of July, 1926, in the Soft Drink Bar and Lunch Room located at 4942 South 26th street, in the City of Omaha, County of Douglas, in the Omaha Division of the District of Nebraska, then and there being, did then and there unlawfully, willfully, and knowingly sell to Newton Splawn, certain intoxi-

3

cating liquor, to wit, 4 drinks of moonshine whiskey, containing more than one-half of one per cent of alcohol by volume, and fit for beverage purposes, without first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Fifth Count

And the said United States Attorney, who prosecutes for the United States as aforesaid, further gives the Court to understand and be informed, that said Glen Murray and R. H. Schaefer, first, real and true name unknown, heretofore, to wit, on or about the 20th day of July, 1926, in the Soft Drink Bar and Lunch Room located at 4942 South 26th street, in the City of Omaha, County of Douglas, in the Omaha Division of the District of Nebraska, then and there being, did then and there unlawfully, willfully, and knowingly sell to Charles Campbell, certain intoxicating liquor, to wit, 12 drinks of alcohol, fit for beverage purposes, without first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Sixth Count.

And the said United States Attorney, who prosecutes for the United States as aforesaid, further gives the Court to understand and be informed, that said Glen Murray and
4 R. H. Schaefer, first, real and true name unknown, heretofore, to wit, on or about the 20th day of July, 1926, in the city of Omaha, county of Douglas, in the Omaha Division of the District of Nebraska, then and there being, did then and there unlawfully, willfully, and knowingly maintain a common nuisance, that is to say, the said Glen Murray and R. H. Schaefer, first, real and true name unknown, did unlawfully possess, control, manage, operate, and maintain a place, which was used as a Soft Drink Bar and Lunch Room, located at 4942 South 26th street, in the city of Omaha, county of Douglas, in the Omaha Division of the District of Nebraska, where there was kept for sale and bartered and sold intoxicating liquor containing more than one-half of one per cent of alcohol by volume, and which was fit for beverage purposes, without first obtaining a permit from the Commissioner of Internal Revenue so to do; con-

trary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

JAMES C. KINSLER
United States Attorney,
By ANDREW C. SCOTT
Assistant United States Attorney

United States of America,
District of Nebraska,
Omaha Division. } ss.

Andrew C. Scott, Assistant United States Attorney for the District of Nebraska, being first duly sworn, on his oath, says that the facts stated in the foregoing Information are true, as he verily believes.

ANDREW C. SCOTT
Assistant United States Attorney

Subscribed and sworn to before me this 9th day of September, A. D. 1926.

R. C. HOYT
(Seal) Clerk of the United States District Court,
District of Nebraska

By JOHN NICHOLSON, Deputy

5 Endorsed: No. 4601 United States District Court, District of Nebraska, Omaha Division. The United States vs. Glen Murray and R. H. Schaefer, first, real and true name unknown. Information Violation National Prohibition Act; Sales of Intoxicating Liquor and Maintaining a Common Nuisance. Filed Sep 9 1926 R. C. Hoyt, Clerk.

---

6 (Arraignment and Plea of Not Guilty.)

September Term, 1926. October 20, 1926.

Before Judge Woodrough.

The defendants, Glen Murray and R. H. Schaefer, first, real and true name unknown, appear at the bar of the Court, personally, and are duly arraigned upon the information presented and filed herein against them, charging violations of the National Prohibition Act, as charged therein.

Thereupon, said defendants enter pleas of "Not Guilty" to the offenses as charged in said information.

---

7 (Entry of Plea of Guilty.)

September Term, 1926. October 22, 1926.

Before Judge Woodrough.

The above named defendants having been heretofore duly arraigned upon the information filed herein against them, and having entered pleas of "Not Guilty", come now and withdraw said pleas, and each enter pleas of "Guilty" to the offenses as charged in said information. (5 sales and 1 nuisance.)

It Is Ordered, by the Court, that this cause be, and the same is hereby continued for sentence as to each defendant, to October 25, 1926.

---

8 (Judgment and Sentence, October 25, 1926.)

Thereupon Afterwards, to-wit. On the 25th day of October, 1926, being one of the days of the September 1926 term of said Court held in the City of Omaha before Hon. J. W. Woodrough, one of the Judges of said Court, the following among other proceedings were had in the words and figures following, to-wit:

United States of America, vs. Glen Murray and R. H. Schaefer, first name unknown.	No. 4601 Criminal,

The above named defendants having heretofore entered pleas of guilty to the offenses as charged in the information filed herein, and said cause having been continued for sentence to this date; Now comes the United States Attorney and moves the Court that sentence and judgment be pronounced against each of said defendants, upon the pleas as entered herein. And said defendants being asked whether they have any legal reason why sentence and judgment should not be pronounced against them, and being heard in that behalf and no cause being shown, it is by the Court,

Considered, Ordered and Adjudged, That the defendant, Glen Murray, be imprisoned in the Jail of Douglas County, at Omaha, Nebraska, for a term of Three (3) months, on each count of the information to run concurrently, from October 25, 1926. And it is

Considered, Ordered and Adjudged, That the defendant, R. H. Schaefer, first name unknown, be imprisoned in the

jail of Douglas County, at Omaha, Nebraska, for a term of Three (3) months, on each count of the information to run concurrently, from October 25, 1926.

9

Final Commitment

(Original) 4601 Criminal
United States of America
District of Nebraska
Omaha Division

The President of the United States of America

To the Marshal of the United States for the District of Nebraska, and to the Keeper of the Common Jail of Douglas County, Nebraska,

Greetings:

Whereas, on the 22nd day of October, 1926, at a term of the District Court of the United States, for the District of Nebraska, held at Omaha in said District, Glen Murray, was convicted of [a] the crime of violation of the National Prohibition Act, and among other things, sentenced to be imprisoned in the said Common Jail of Douglas County, Nebraska, situated at Omaha, for the period of three (3) months as to each count of the information to run concurrently. Sentence to commence October 25, 1926.

Now, Therefore, You, the Said Marshal, are hereby commanded to deliver to the said Keeper of the said Common Jail of Douglas County, Nebraska, the body of Glen Murray, who is now in your custody.

And you, the said Keeper of said Common Jail of Douglas County, Nebraska, are hereby commanded to receive the body of the said Glen Murray and safely keep him in said Jail until said sentence of imprisonment shall have been fully complied with, or until he shall have been discharged therefrom by due course of law.

Witness, the Honorable the Judges of the District Court of the United States for the District of Nebraska, at Omaha this 25th day of October, 1926.

(Seal) R. C. HOYT, Clerk

By F. A. MOORE, Deputy

---

10 Return

Received this Commitment on the 25 day of Oct 1926 and on same day, I delivered the within-named Glen Murray to the custody of the within-named Jail Keeper with whom I left at the same time a certified copy of this Commitment.

Dated this 25 day of Oct 1926

D. H. CRONIN
U. S. Marshal

By J. A. DAVIS
Deputy

Endorsed: Filed in U. S. District Court on Nov. 4, 1926.

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11 (Order granting Parole.)

Thereupon Afterwards, to-wit. On the 26th day of October, 1926, being one of the days of the September 1926 term of said Court held in the City of Omaha, before Honorable J. W. Woodrough, one of the judges of said Court, the following among other proceedings were had in the words and figures following, to-wit:

United States of America,
vs.
Glen Murray,
} No. 4601 Criminal, Parole

The defendant, Glen Murray, having been heretofore duly arraigned, and having entered pleas of guilty to the offenses as charged in the information filed herein, charging violation of the National Prohibition Act. (5 sales, 1 nuisance)

And the Court having imposed a sentence of Three (3) months in the Douglas County Jail, at Omaha, Nebraska, on each count, to run concurrently, from October 25, 1926.

It appearing that the ends of justice, together with the welfare of the defendant and the public, could be served by suspending further execution of the foregoing sentence. And the Court having cautioned and admonished the defendant, it is by the Court,

Ordered and Adjudged, That said defendant, Glen Murray, be placed on probation for the period of two (2) years, under the personal supervision of Robert P. Samardick, who is hereby appointed and constituted probation officer in this case.

---

12 Assignment of Errors

Comes now the United States of America, plaintiff, and by its District Attorney for Nebraska files the following Assignment of Errors in the above entitled cause:

Assignment No. One.

The court erred in entering its order of October 26, 1926, releasing Defendant Glen Murray from the custody of the jailer and placing said defendant on probation for the reason that said defendant had, on October 25, 1926, entered upon the execution of a sentence of three months on each of five counts to run concurrently (imposed by this court for violation of the National Prohibition Act).

Assignment No. Two.

The court erred in placing Defendant Glen Murray on probation after execution of his sentence had begun at an ex parte proceeding of which the United States of America had no notice, and was, therefore, not present to present its case or except to the rulings of the court.

THE UNITED STATES OF AMERICA,
Plaintiff in Error

by JAMES C. KINSLER,
United States Attorney,
and
ANDREW C. SCOTT
Assistant United States Attorney

Endorsed: Filed Jan 25 1927 R. C. Hoyt, Clerk.

---

13 Petition for Writ of Error

To the Honorable George C. Scott, Judge of the District Court of the United States for the District of Nebraska, Omaha Division:

The plaintiff, The United States of America, conceiving itself aggrieved and prejudiced in certain orders and rulings of the court in said cause, and alleging divers grievous and prejudicial errors of the court in the making of said orders and rulings and final judgments herein, has filed herein an Assignment of Errors complained of, and prays for an allowance of a Writ of Error in said cause to the United States Circuit Court of Appeals for the Eighth Circuit and that a

Transcript of the Record and proceedings, duly authenticated, may be sent to said Court of Appeals.

THE UNITED STATES OF AMERICA, Plaintiff,

By JAMES C. KINSLER, United States Attorney.
and
ANDREW C. SCOTT
Assistant United States Attorney

Endorsed: Filed Jan 26 1927 R. C. Hoyt, Clerk.

---

14 Order Allowing Writ of Error

Upon the hearing of the Petition for a Writ of Error by the plaintiff in error, The United States of America, and it appearing that an Assignment of Errors has been duly made and filed as requested by law, it is:

Ordered, that the Writ of Error be, and the same is allowed to the end that the judgment of the court heretofore entered herein may be reviewed in the United States Circuit Court of Appeals for the Eighth Circuit.

By THE COURT,

GEO. C. SCOTT
Judge of the District Court of the United States, District of Nebraska, Omaha Division.

Endorsed: Filed Jan 25 1927 R. C. Hoyt, Clerk.

---

15 (Writ of Error and Clerk's Return.)

United States of America, ss:

The President of the United States,

To the Honorable Judge of the District Court of the United States for the District of Nebraska, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the September Term, 1926, thereof, between The United States of America, and Glen Murray, a manifest error has happened, to the great damage of the said The United States of America, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the

parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 26th day of March, 1927, to the end that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 25th day of January, 1927.

Issued at my office in the City of Omaha, Nebraska, with the seal of the District Court of the United States for the District of Nebraska, dated as aforesaid.

(United States District Court Seal
District of Nebraska
Omaha Division)

R. C. HOYT
Clerk, U. S. District Court,
District of Nebraska.
By JOHN NICHOLSON
deputy

Allowed by

GEO. C. SCOTT,
Judge.

Return to Writ

United States of America,
District of Nebraska,
Omaha Division. } ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and

affix the seal of said District Court, at my office in the City of Omaha, this 27th day of January, A. D. 1927

(United States District Court Seal District of Nebraska Omaha Division)

R. C. HOYT
Clerk of said Court.
JOHN NICHOLSON
deputy

Endorsed: Filed in U. S. District Court on Jan. 25, 1927.

16

Citation

United States District Court, District of Nebraska, Omaha Division

The United States of America,
Plaintiff,
vs.
Glen Murray, et al,
Defendants.

Number 4601 Criminal

To Glen Murray, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a Writ of Error, filed in the Clerk's office of the District Court of the United States for the District of Nebraska, Omaha division, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Judges of the District Court of the United States for the District of Nebraska, Omaha division, this 25th day of January, 1927.

GEO C. SCOTT
United States District Judge, District of Nebraska, Omaha division

Service of this citation accepted by Glen Murray, Defendant in Error, this 25th day of January, 1927.

GLEN MURRAY
Defendant in Error

Filed Jan. 25, 1927, R. C. Hoyt, Clerk.

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17 Praecipe for Transcript

To the Clerk of Said Court:

Please prepare Transcript of Record in the above cause for the United States Circuit Court of Appeals for the Eighth Circuit, same to consist of the following:

Information filed September 9, 1926.

Plea of guilty entered on October 22, 1926.

Order and judgment of the court entered on October 25, 1926.

Final Commitment

Return of the Marshal thereto

Order of the Court made and entered [Octover] 26, 1926, releasing the defendant from custody and placing him on probation.

Evidence, if any, before the Court at the time order was entered releasing said defendant from custody and placing him on probation.

Petition for Writ of Error.

Assignment of Errors

Order allowing Writ of Error

Writ of Error

Citation

Praecipe

Transcript of Clerk's certificate to Transcript.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
By JAMES C. KINSLER,
United States Attorney,
and
ANDREW C. SCOTT
Assistant United States Attorney

Service accepted by Glen Murray, Defendant in Error, this 25th day of January, 1927

GLEN MURRAY
Defendant in Error

Endorsed: Filed Jan 25 1927 R. C. Hoyt Clerk.

---

18 Clerk's Certificate

In the United States District Court,
District of Nebraska,
Omaha Division.

United States of America, }
District of Nebraska. } ss

I, R. C. Hoyt, Clerk of the District Court of the United States Within and for the District of Nebraska, hereby certify that pursuant to the foregoing writ of error and in obedience thereto, and in compliance with the Praecipe, a copy of which is found on page..... hereof, the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings on file and of record in said court, as mentioned in said praecipe and as indicated in the foregoing index, in the case of No. 4601 Law, The United States of America vs. Glen Murray, and that copies of the writ of error and citation, duly certified, have been lodged and remain in my office as such clerk.

Witness My Hand and the Seal of said Court at Omaha in said District this 31st day of January A. D. 1927.

R. C. HOYT
Clerk

(United States District
Court Seal
District of Nebraska
Omaha Division)

Filed Feb 1 1927 E. E. Koch Clerk

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14 United States Circuit Court of Appeals, Eighth Circuit

No. 7736

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

GLEN MURRAY

Appearance of counsel

Filed Feb. 4, 1927

The clerk will enter my appearance as counsel for the plaintiff in error.

JAMES C. KINSLER,
U. S. Attorney,
AMBROSE C. EPPERSON,
WILLIAM J. FROELICH,
GEORGE A. KEYSER,
Assistant U. S. Attys.

[File indorsement omitted.]

In United States Circuit Court of Appeals

Submission

May 26, 1927

This cause having been called for hearing in its regular order and counsel not appearing for either of the parties to make oral argument and no brief having been filed for the defendant in error in this court, this cause is by the court taken as submitted on the transcript of the record from said District Court and the brief of counsel for plaintiff in error filed herein.

15 In United States Circuit Court of Appeals

Order to file and enter certificate of question to Supreme Court

July 12, 1927

A certain question having arisen on the record in this cause, upon which this court desires the instruction of the Supreme Court of the United States as provided by law, and a certificate of such question having been prepared and duly signed, it is now here ordered by this court that such certificate be filed and entered of record in this court and that the original thereof be duly certified by the clerk

of this court and that it be by him duly transmitted to the Supreme Court of the United States for its action thereon.

[Cerificate of question to the Supreme Court of the United States; omitted in printing; printed under separate cover.]

18 [Clerk's certificate to foregoing transcript omitted in printing.]

○

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 394

THE UNITED STATES OF AMERICA

vs.

GLEN MURRAY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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COPY BOU

1 In United States Circuit Court of Appeals, Eighth Circuit

No. 7736

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR vs. GLEN MURRAY, DEFENDANT IN ERROR	In error to the District Court of the United States for the District of Nebraska

A certain question of law has arisen on hearing of this cause in this court upon which the instruction of the Supreme Court is desired in order to properly decide the same.

Statement of facts

On October 22, 1926, in the District Court of the United States for the District of Nebraska, defendant in error plead guilty to certain violations of the national prohibition act. On October 25, 1926, he was sentenced under said plea of guilty to a term of three months imprisonment in the Douglas County jail at Omaha, Nebraska. On the 25th day of October, 1926, he was delivered by the United States marshal, in pursuance of said judgment and sentence, to the jail keeper, and on said date he commenced serving his sentence. On October 26, 1926, and during the same term of court, the court entered an order placing the defendant in error on probation, said order in part reading as follows:

"Ordered and adjudged, that said defendant, Glen Murray, be placed on probation for the period of two (2) years, under the personal supervision of Robert P. Samardick, who is hereby appointed and constituted probation officer in this case."

Defendant in error was thereupon released and placed in charge of said Robert P. Samardick.

2 It is the contention of the Government that probation could not be granted by the District Court after defendant in error commenced serving his sentence.

Question certified

Did the United States District Court for the District of Nebraska have authority under the act of March 4, 1925, 43 Stat. L., Chap. 521, page 1259, to make, during the term at which sentence was imposed, the order placing defendant in error upon probation after he had commenced to serve the sentence?

This question of law is by the United States Circuit Court of Appeals for the Eighth Circuit hereby certified to the Supreme Court

D CLOSE IN CENTER

in accordance with the provisions of section 239, United Stat
Judicial Code.

WM. S. KENYON,
United States Circuit Judge.
JOSEPH W. MOLYNEAUX,
United States District Judge.
JOHN B. SANBORN,
United States District Judge.

(The judges who sat in the Circuit Court of Appeals on the hea
ing of the case.)

3 [Clerk's certificate to foregoing omitted in printing.]

(Indorsement on cover:) File No. 32,846. U. S. Circuit Court o
Appeals, Eighth Circuit. Term No. 394. The United States o
America vs. Glen Murray. (Certificate.) Filed July 21, 1927. Fi
No. 32,846.

○

[redacted]

Supreme Court of the United States

[redacted]

No. 839

[redacted]

[redacted]

v.

[redacted]

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

FREDERICK A. COOK, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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[Caption omitted]

[fol. 2] No. 2273

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

APPLICATION FOR PROBATION—

Filed February 11, 1927.

To the Honorable James C. Wilson, Judge of said Court:

Comes now Frederick A. Cook hereinafter styled petitioner, and petitions this honorable court to place this defendant upon probation for the period of five years, and to appoint a suitable person to act as probation officer for petitioner when so placed upon probation, to act without compensation, as provided in the Act of March 4, 1925, passed by the Congress of the United States, which Act provides in substance, that the Courts of the United States having original jurisdiction in criminal cases, have the power after conviction to place the defendant upon probation for not exceeding five years, upon such terms and conditions as the court may deem best when it shall appear to the satisfaction of the court that the ends of justice will be thereby subserved. In this connection your petitioner respectfully represents as follows:

That heretofore and on the 21st day of November, A. D. 1923, in cause No. 2273, on the docket of this court your petitioner was convicted on twelve counts of an indictment which charged him with having used the United States' mails in executing a scheme to defraud, within the meaning of section 215 of the United States Criminal Code, and was then and there in this honorable court, sentenced to serve in the United States Penitentiary at Leavenworth, Kansas, a total of fourteen years and nine months, and to pay a fine of $1,000.00 on each of the twelve counts on which he was convicted, [fol. 3] or to pay a total fine of $12,000.00, the said sentence having been imposed by the Honorable James Kil-

litts, acting by designation as judge of this court in said cause No. 2273.

Your petitioner further represents that after his conviction, as aforesaid, he carried his case to the United States Circuit Court of Appeals for the Fifth Circuit by writ of error, for review, and that in the month of February, A. D. 1925, the said Circuit Court of Appeals in all things sustained and affirmed the said judgment of conviction; that thereafter your petitioner made no further attempt to have said cause reviewed by a higher court, but accepted the decision of the said Circuit Court of Appeals as final.

Your petitioner further represents that immediately upon being convicted on November 21, 1923, as aforesaid, he was placed in the custody of the United States Marshal at Fort Worth, Texas, who immediately caused him to be placed and incarcerated in the county jail of Tarrant County, Texas, in the City of Fort Worth, Texas, where he remained confined until after his said case had been affirmed by the said Circuit Court of Appeals, as herein stated, and until the month of April, A. D. 1925, when he was transported to and placed in the United States Penitentiary at Leavenworth, Kansas, since which time he has remained incarcerated in said penitentiary. That, as is shown by the records of this court in said cause No. 2273, this court, through the said judge Killitts, in connection with his appeal by writ of error to the Circuit Court of Appeals, required as a condition precedent to his gaining freedom on bond pending the outcome of said appeal, that your petitioner make and furnish a good and sufficient supersedeas bond conditioned for the payment of the fine of $12,000.00 imposed on petitioner, as aforesaid, and the payment of all costs, which said [fol. 4] supersedeas bond your petitioner was absolutely unable to make and furnish by reason of the fact that he was penniless and a pauper, and could not secure the execution of such a bond. That by reason thereof he was necessarily confined in the Tarrant County jail, as aforesaid, pending said appeal.

Your petitioner further represents that just immediately prior to the time that he was transported to and placed in the United States penitentiary at Leavenworth, Kansas, this honorable court, acting by and through Judge James C. Wilson, entered its order and judgment that the service of the sentence imposed upon your petitioner in said cause should commence as of the date on which your petitioner was confined in Tarrant County jail, as aforesaid, to-wit, the 21st day of November, A. D. 1923, so as to order and decree that the time served in the said Tarrant County jail, as herein set forth, should apply as so much service of the sentence imposed upon your petitioner in said cause. That giving due effect to said order your petitioner has served more than three years of his said sentence, and that in any event he has been continuously confined and incarcerated by virtue of said conviction since the said 21st day of November, A. D. 1923.

Your petitioner further represents that the customary and usual sentence imposed upon violators of section 215, commonly known as the mail statute, is not in excess of five years, and that had your petitioner received a total sentence of not exceeding five years he would now be eligible to parole under the United States' parole act. Your petitioner further represents that the sentence imposed upon him, as he conscientiously believes and alleges was and is excessive and greatly out of proportion to the offense for which he was convicted and out of proportion to the punishment which is usually meted out to like offenders.

Your petitioner further represents that he is a man now past sixty-one years of age and that if he is required [fol. 5] to serve the entire period of fourteen years and nine months sentence he will probably spend the remainder of his life confined in the United States Penitentiary. That prior to the time your petitioner was charged by said indictment with violation of the said section 215 in said cause, he had never been charged

with, nor convicted of any offense whatsoever, and that he has never been convicted except in said cause. Your petitioner further says that being a man well known nationally as well as internationally he has suffered untold punishment by virtue of his conviction and incarceration, as set forth herein, and that the ends of justice and the best interest of the public as well as your petitioner will be subserved by this Honorable Court placing your petitioner upon probation, as herein sought.

WHEREFORE, premises considered, your petitioner prays this honorable court that the Government of the United States, through its District Attorney, located at Fort Worth, Texas, to-wit, Henry Zweifel, be given due notice of this application, and that a time be fixed for a hearing hereof, and that upon hearing of this application this Honorable Court enter due and appropriate orders placing your petitioner on probation for a period of five years, in the care of a special probation officer to be appointed by this court to act without compensation, and ordering and directing the officers in charge of the United States penitentiary at Leavenworth, Kansas, to forthwith discharge and release your petitioner from custody.

(Sgd) Frederick A. Cook, Petitioner.
(Sgd) H. C. Wade, Attorney for Petitioner.

[File endorsement omitted]

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

RESPONDENTS REPLY
Filed March 3rd, 1927.

To the Honorable James C. Wilson, Judge of said Court:

Comes now the United States, through and by Henry Zweifel, its United States Attorney for the Northern District of Texas, and in reply to the petition of the said Fred-

erick A. Cook filed in this Honorable Court on the 8th day of February, 1927, wherein application is made for probation for a period not exceeding five years as provided in the Act of March 4, 1925, and respectfully submits and alleges as follows:

I.

That heretofore, to-wit, on the 21st day of November, 1923, Cause No. 2273, Fort Worth Division, the petitioner was convicted by this Court on twelve counts of the indictment which charged a violation of Section 215 of the United States Criminal Code and was then and there in this Honorable Court sentenced to serve in the United States penitentiary at Leavenworth, Kansas, a total of fourteen years and nine months and to pay a fine of $12,000.00, and thereafter this Court caused said petitioner's sentence to commence as of the 21st day of November, A. D. 1923.

That the petitioner, at the time of the offense [fol. 7] aforesaid, was a man of mature years and intelligence, being fully aware of all acts committed by him and the consequence thereof; that he was not merely technically guilty of the violation charged but same involved a great amount of moral turpitude; that he was given a due and just trial, same having been appealed to the Supreme Court of the United States, and the conviction imposed by this Honorable Court affirmed and sustained in all things; that the amount of time already served by petitioner, which, taking into consideration the antedating of the sentence by the Court, amounts to a period of only three years and three months, such period of time not being sufficient punishment for the serious and grave offenses of which the petitioner was found guilty and convicted.

That if petitioner were released at this time upon probation, he would be compelled to return to the penitentiary five years hence and serve the remainder of his sentence, which your respondent says was not the intention and meaning of Congress in the passage of the Probation Act of March 4, 1925, aforesaid.

That all things considered, petitioner's application for release upon probation is without merit at this time and his petition should, accordingly, be, in all things, denied by this Court on the ground that said petition is without merit and foundation at this time.

II.

That, even assuming said application and petition to be meritorious, without admitting same, your respondent says that this Honorable Court is without jurisdiction to hear and pass upon this application as:

1. The Court does not have the power to admit or release a defendant upon probation after a partial service of the sentence has commenced.

[fol. 8] That it was the intention of Congress in the passage of the Probation Act, to vest in the Courts of the United States the power, which they did not legally have prior to the enaction of said Act, to suspend sentences in necessary cases such as first offenders and in those instances where a suspension of sentence or release of the defendant upon probation, would subserve the best interests of society in placing an unfortunate defendant upon probation, keeping the stigma of a penitentiary sentence from his name; and it was not the intention of the Congress that this Act should be materially radical or different from the majority of Probation Acts now in effect in most of the States nor was it the intention that this Act should give the Courts of the United States power to release a defendant upon probation after he had begun the service of his sentence.

2. The court does not have the right to exercise the power of release upon probation after the expiration of the trial term in which the judgment of conviction was rendered.

3. The Probation Act of March 4, 1925, does not apply to a defendant who was convicted and had commenced the service of his sentence prior to the passage of the Act and especially when the term of Court in which the defendant

was convicted had also expired before the passage of the Act.

WHEREFORE all things being considered your respondent prays of this Honorable Court that Frederick A. Cook, the petitioner herein, be denied his petition and that the said application, in all things, be dismissed.

(Sgd) Henry Zweifel, United States Attorney.

[File endorsement omitted]

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

JUDGMENT—March 17, 1927.

On this the 17th day of March, A. D. 1927, came on to be heard the application of petitioner Frederick A. Cook in the above entitled and numbered cause wherein he petitions this honorable court for an order, judgment and decree placing him upon probation for a period of five years in accordance with the Parole Act passed by Congress March 4, 1925; and petitioner appeared by his attorneys and the Government, having filed an answer to said petition, appeared by the United States District Attorney in and for the Northern District of Texas, to-wit, Henry Zweifel; and the court, having fully heard and understood the pleadings, evidence and argument of counsel and being fully advised in the premises, and it appearing to the satisfaction of this court that the ends of justice and the best interests of the public as well as of this defendant and applicant Frederick A. Cook will be subserved by granting said application and placing petitioner upon probation as herein provided, the court is of the opinion that said application should be granted.

It is therefore ORDERED, ADJUDGED AND DECREED that the execution of the sentence of imprisonment and to pay a fine of Twelve Thousand Dollars ($12,000.00) [fol. 10] heretofore imposed upon the said Frederick A. Cook in this case by this court be, and the same is hereby, suspended and the authority of the Warden and other officials of the United

States penitentiary at Leavenworth, Kansas, to hold the petitioner under the judgment of this court, and the commitment issued thereunder, is hereby revoked, until the further orders of this court, and that petitioner Frederick A. Cook be, and he is hereby, placed upon probation for a period of five years conditioned only that while on probation said Frederick A. Cook, shall report once every six months to W. Erskine Williams, and further conditioned that he shall abide by and obey the laws of the United States, the State of Texas, and each and every other State or Country where he shall be situated during said period; and that the said W. Erskine Williams is hereby appointed special probation officer by this court to receive the reports every six months herein provided for from Frederick A. Cook, and to transmit the same to this court.

It is further ORDERED, ADJUDGED AND DECREED that the warden of the United States penitentiary at Leavenworth, Kansas, as well as all officers and agents of the United States Government in charge of said United States penitentiary at the place aforesaid be, and they are hereby ordered, directed and commanded to forthwith discharge and release the said Frederick A. Cook from custody and from the said penitentiary and the clerk of this court is directed to transmit under the seal of this court to the said officials in charge of the said penitentiary at Leavenworth, Kansas, a certified copy of this order, judgment and decree.

James C. Wilson, United States District Judge.

[File endorsement omitted]

[fol. 11] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

BILL OF EXCEPTIONS

Filed March 25, 1925.

To the Honorable James C. Wilson, Judge of Said Court:

Now comes the United States of America through and by

Henry Zwiefel, its United States Attorney for the Northern District of Texas, and would respectfully take exception generally and specifically to the ruling and order of the Court entered on this, the 17th day of March, A. D. 1927, wherein Frederick A. Cook was released on probation under the Act of March 4, 1925, and wherein the payment of a fine in the amount of $12,000.00 assessed in said cause was suspended by the Court, in that the Court was without jurisdiction to entertain and hear the petition hereinbefore filed in this matter and was without jurisdiction and lacking in power and authority to so release the said Frederick A. Cook on probation aforesaid or to suspend the payment of his fine of $12,000.00.

Respectfully,

Henry Zwiefel, United States Attorney.

Settled, Approved and Ordered Filed this the 25 day of March, 1927.

James C. Wilson, United States District Judge.

[File endorsement omitted]

[fol. 12] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

PETITION FOR WRIT OF ERROR

Filed March 25, 1927.

To the Honorable James C. Wilson, Judge of Said Court:

Comes now the United States of America by and through Henry Zwiefel, its District Attorney for the Northern District of Texas, and would respectfully show to the Court that an order was entered herein on the 17th day of March, 1927, against your petitioner and in favor of Frederick A. Cook, wherein the said Frederick A. Cook was ordered released from the Federal Penitentiary at Leavenworth, Kansas, where he is now incarcerated serving a sentence of fourteen

years and nine months for violation of Section 215 of the Criminal Code, said Frederick A. Cook being released on probation under the Act of March 4, 1925, and further that to the ruling and order of said Court the United States of America has expressly taken its general and specific exceptions, said exceptions being allowed by the Court and said order was on the 17th day of March, 1927, made final.

And your petitioner the United States of America feeling that it is aggrieved by said ruling and order in that it is of the opinion that the Court was without jurisdiction to hear and entertain said petition for release on probation at the time it was so heard, hereby petitions the Court for an order allowing a writ of error to this petitioner and allowing this petitioner to prosecute writ of [fol. 13] error to the Circuit Court of Appeals for the Fifth Circuit from the District Court of the United States for the Northern District of Texas, Fort Worth Division, and in connection with this petition, petitioner herewith presents his assignments of error praying that the order and judgment be reversed, and your petitioner further prays that this order be granted without requiring the United States of America to give an appeal bond in the matter.

Henry Zwiefel, United States Attorney.

[File endorsement omitted]

[fol. 14] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

ASSIGNMENT OF ERRORS

Filed March 25, 1927.

Comes now the United States of America by and through Henry Zwiefel, its United States District Attorney for the Northern District of Texas, plaintiff in error in the above entitled and numbered cause and in connection with its petition for writ of error in said cause assigns the following errors which plaintiff in error avers occurred on the hearing

thereof, and upon which plaintiff in error relies to reverse the order of the Court as entered therein, as same appears of record:

FIRST ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore assessed against Frederick A. Cook, defendant in error, (Petitioner below), and in ordering him released on probation from the Federal Penitentiary at Leavenworth, Kansas, where he was then incarcerated serving a sentence of fourteen years and nine months for violation of Section 215 of the Penal Code, as the Court was without power or jurisdiction to hear and entertain such petition and was without jurisdiction and lacking in authority and power to so release defendant in error and suspend the payment of his fine aforesaid for the reason that he had begun the serving of his sentence [fol. 15] prior to the passage of the Probation Act of March 4, 1925.

SECOND ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore assessed against Frederick A. Cook, defendant in error, (Petitioner below), and in ordering him released on probation from the Federal Penitentiary at Leavenworth, Kansas, where he was then incarcerated serving a sentence of fourteen years and nine months for violation of Section 215 of the Penal Code, as the Court was without power or jurisdiction to hear and entertain such petition and was without jurisdiction and lacking in authority and power to so release defendant in error and suspend the payment of his fine aforesaid for the reason that the term at which he was sentenced had long since expired.

THIRD ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore assessed against Frederick A. Cook, defendant in error, (Petitioner below), and in order-

ing him released on probation from the Federal Penitentiary at Leavenworth, Kansas, where he was then incarcerated serving a sentence of fourteen years and nine months for violation of Section 215 of the Penal Code, as the Court was without power or jurisdiction to hear and entertain such petition and was without jurisdiction and lacking in authority and power to so release defendant in error and suspend the payment of his fine afiresaid for [fol. 16] the reason that he had already begun the service of the sentence imposed upon him at the time of his petition for probation.

FOURTH ASSIGNMENT OF ERROR.

The Court erred in ordering defendant in error released on probation aforesaid as the Court was lacking in power and authority and without jurisdiction to so order, in that the Probation Act of March 4, 1925, under which said probation was granted, is void, and contrary and repugnant to the meaning and spirit of Article 2, Sections 1 and 2 of the Constitution of the United States when applied to a case as in the instant cause, in that an interpretation of the Act as here applied in a case as the one in hand is an encroachment of the judiciary upon the executive branch of the Government of the United States, as the Constitution expressly reserves the executive functioning of the Government to the President of the United States and further gives to the President alone, the power to grant pardons and reprieves.

FIFTH ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore assessed against defendant in error as the Court was lacking in power and authority and without jurisdiction to so order, in that the Probation Act of March 4, 1925, under which said suspension of fine was made is void and [fol. 17] contrary and repugnant to the meaning and spirit of Article 2, Sections 1 and 2 of the Constitution of the United States when applied to a case as in the instant cause, in that an interpretation of the Act as here ap-

plied in a case as the one in hand is an encroachment of the judiciary upon the executive branch of the Government of the United States, as the Constitution expressly reserves the executive functioning of the Government to the President of the United States, and further gives to the President alone, the power to grant pardons and reprieves which includes the suspension and remittance of fines and penalties.

SIXTH ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore imposed on defendant in error, in that the Court is lacking in authority and power and without jurisdiction to so cancel debts and obligations to the United States and the Congress of the United States is without authority or power under the terms and provisions of the Constitution to delegate to the judicial branch of the Government such authority, the Probation Act of March 4, 1925, in this respect being void and unconstitutional.

SEVENTH ASSIGNMENT OF ERROR.

The Court erred in releasing the defendant in error on probation for a period of five years and in suspending the payment of the fine of $12,000.00 theretofore imposed upon him in accordance with the Probation Act of March 4, 1925, in that the Court was without jurisdiction to so order, since the Probation Act of March 4, 1925, is void and is repugnant and contrary to the meaning and spirit of [fol. 18] the Fifth Amendment of the Constitution of the United States and therefore unconstitutional, as the order of the Court expressly released defendant in error "upon probation for a period of five years in accordance with Parole" (Probation) "Act passed by Congress March 4, 1925," said Act granting to this Court the power to require defendant in error to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offenses for which conviction was had and for the support of any person or persons for whose support he is legally responsible, this rendering the order of

the court, which was as stated above, subject to this condition, an Act wholly without authority or law, in that said order carries with it the power of the court to deprive defendant in error of property without due process of law, and does in fact so deprive defendant in error of property and rights without due process of law.

WHEREFORE, plaintiff in error prays that the decree and order of said court be in all things reversed, and that a writ of prohibition issue against the trial court commanding that further jurisdiction in the cause be not exercised.

Henry Zwiefel, United States Attorney.

[File endorsement omitted]

[fol. 19] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

Filed March 25, 1927.

On this the 25 day of March, A. D. 1927, came on to be heard the petition of the United States of America, through and by Henry Zwiefel, its District Attorney for the Northern District of Texas, for the issuance of a writ of error on its behalf to the Circuit Court of Appeals of the United States for the Fifth Circuit.

It is hereby ordered that a writ of error to the Circuit Court of Appeals for the Fifth Circuit from the order and decree heretofore filed and entered herein in favor of Frederick A. Cook releasing him on probation for a period of five years from the Federal Penitentiary at Leavenworth, Kansas, where he is now incarcerated, be, and the same is hereby, allowed, and that a certified transcript of record, assignments of error and all proceedings in the case be forthwith transmitted to the Circuit Court of Appeals of the United States for the Fifth Circuit, duly certified according to law, in order that

said court may inspect the same and take such action therein as it deems proper, according to law.

[fol. 20] It is further ordered that the United States of America be not required to furnish appeal bond pending the review of this cause.

(Sgd) James C. Wilson, United States District Judge.

[File endorsement omitted]

[fol. 21] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

PRAECIPE

Filed March 25, 1927.

To George W. Parker, Clerk of the United States District Court for the Northern District of Texas, at Fort Worth:

Please prepare transcript of record in the above entitled and numbered cause and include therein the following instruments in the following order:

(1) Caption.
(2) Petition of Frederick A. Cook for release on probation.
(3) Reply of United States.
(4) Opinion of Court.
(5) Order of Court releasing petitioner on probation.
(6) Government's Exception to Ruling and Order of Court.
(7) Petition for Writ of Error.
(8) Assignment of Error.
(9) Order Allowing Writ of Error.
(10) Writ of Error.
(11) Waiver of Citation.
(12) Praecipe for Transcript.
(13) Certificate of Clerk.

Henry Zwiefel, United States District Attorney.

[fol. 22] We, the undersigned attorneys for Frederick A. Cook, hereby accept service of the above Praecipe, a copy thereof having been received by us, and we agree that the documnts shall constitute the transcript in this cause.

Callaway & Wade,
By H. C. Wade.

[File endorsement omitted]

[fol. 23] District Court Clerk's Certificate omitted in printing.]

[fol. 24] [Title omitted]

WRIT OF ERROR

Filed March 25, 1927.

The United States of America, the President of the United States—To the Honorable Judge of the District Court of the United States for the Northern District of Texas, Greetings:

Because in the record and proceedings, as also in the rendition of the order and decree on a plea which is in the said District Court before you or some of you, between the United States of America, plaintiff in error (Respondent below), and Frederick A. Cook, defendant in error, (Petitioner below), No. 2273 Criminal on the docket of said court in the Fort Worth Division of the Northern District of Texas, a manifest error hath happened to the great damage of the said the United States of America, as by its complaint appears.

We, being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Fifth Circuit, together with this [fol. 25] writ, so that you have the same at New Orleans, Louisiana, within

thirty days from the date hereof, in the said United States Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid, being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 25 day of March, in the year of our Lord, Nineteen Hundred and Twenty-seven.

(Seal) Geo. W. Parker,

Clerk of the District Court of the United States for the Northern District of Texas.

By G. B. Buckley, Deputy.

Allowed this the 25 day of March, A. D. 1927.

James C. Wilson, United States District Judge.

[File endorsement omitted]

[fol. 26] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

WAIVER OF CITATION

Filed March 25, 1927.

Comes now Callaway & Wade, Attorneys of Record for Frederick A. Cook, and accepts service, citation and notice of filing of the petition and writ of error herein, and here and now waive any and all other and further notice of the filing of such petition for writ of appeal.

Callaway & Wade,

Attorneys of Record for Frederick A. Cook.

By H. C. Wade.

[File endorsement omitted]

[Title omitted]

[fol. 29] OPINION OF TRIAL JUDGE

Judge Wilson: I will dispose of the petition of Frederick A. Cook for probation.

The petitioner alleges that he was convicted in this court on the 21st day of November, 1923, upon an indictment containing twelve separate counts, charging him with twelve separate offenses, under Art. No. 215, of the Code, and commonly known as the mail-fraud statute.

He alleges that immediately thereafter he took steps to appeal his case to the Circuit Court of Appeals; that a sentence of fourteen years and nine months in the penitentiary was imposed, and in addition a one thousand dollar fine under each count; that a supersedeas bond was required, which in its effect, would be the personal undertaking of sureties to discharge this fine, together with the costs, in the event the case was [fol. 30] affirmed, and that on account of his being a pauper, that he was not able to execute such bond; that the appeal of his case was taken on a pauper's affidavit, and was pending until April, 1925, at which time it was affirmed; that on account of not being able to execute this supersedeas bond, he was compelled to remain in the county jail from the date of his conviction, the 21st day of November, 1923, until his appeal was disposed of, and that immediately thereafter, waiving any rights he might have had to have the matter heard by the Supreme Court, he went immediately to the penitentiary; that taking into account the time served in jail, together with the time served in the penitentiary, he has now been punished for his offense, by such penal servitude, for over three years; that he is now something over sixty-one years of age, that if he is compelled to serve the full time that it will probably mean to him a life sentence; and alleges compliance with the law and the rules of the penitentiary, and prays that he be granted probation for a period of five years, under the Act of March 4, 1925.

The government in its answer denies that there is any merit in the application, and states that the defendant has not suffered sufficiently for the crime committed; that for

these reasons his petition should be denied, and in addition to this, puts in issue the jurisdiction of the court to hear this matter.

The questions in this case, since the petitioner is actually serving his sentence, involve all of the questions that have heretofore been raised in the adjudicated cases, [fol. 31] construing this statute. First, it involves the question as to whether this law is applicable to those convicted prior to the passage of the act, that being the situation of the petitioner. Second, as to the authority of the court to grant the relief prayed for, since the term of the court at which the petitioner was convicted and sentenced, has long since expired; and third, is the law applicable and can it be availed of after the commencement of the service of punishment, and, particularly, has the court such authority where that service and punishment is in a penitentiary, located in another state, and generally speaking, beyond the jurisdiction of this court.

It is necessary, in order to fully appreciate the purpose and objects of this act, and particularly the intent of congress, to look briefly to the causes that brought it about. In all of the cases involving a construction of this act, it has been cited that it was a response to the holding in Ex parte United States, 242 US, 27. In that case, a banker was convicted on a charge of embezzlement, the penalty then being five years, no more and no less. The defendant was sentenced by Judge Killitts to five years in the penitentiary and that sentence suspended for a period of five years and the term of the court, by special order, declared to be opened for a similar period, for the purposes of that case. The facts surrounding the case were such that warranted the action of Judge Killitts, provided he had the authority. The Supreme Court passed on the case in 1916, and Chief Justice White, in his opinion pointed out the trying situation of the district judges, where confronted with [fol. 32] defendants deserving such a remedy, and in effect held that such authority, to be vested in the district judges, was

called for in the interest of the administration of the criminal law itself, as well as by the most obvious considerations of humanity and public well-being, and in substance, gave advanced approbation of such a law, both as to its wisdom, and as to the adequacy of the power of congress to pass same.

Though this decision was cited in the reports of the committee and in the arguments before congress, it is my view that it had comparatively little to do with the passage of the act. And that to ascribe to that case and its holdings the existence of this law would very much narrow the scope of the real purposes and intent of congress. In the first place, it was not passed until nine years after that decision, and in granting powers, under any construction, it goes far beyond anything involved or advised in that case. The proponents of legislation, as advocates do, put forth the strongest arguments they can devise to support their proposition. It was unusual to have the advance approval of the Supreme Court, as to any proposed legislation, both as to its wisdom and constitutionality, and naturally such an eminent authority would be much quoted. In these same reports and arguments we see juveniles cited so much as the beneficiaries of the act, and adult offenders nowhere mentioned, that the government in this case is taking the position that the petitioner is not in the class intended to receive its benefits. Of course appeals to help children are most persuasive and this accounts for the frequent references to juveniles, but since, when we come to the [fol. 33] act itself, we find them not mentioned, and its terms general, it applies of course to one class of offenders the same as another.

It is clearly and concededly, with or without this decision, a remedial statute and comes as another step in a course of dealing by congress with the subject, and looking to a more humane, a less rigid and a more elastic system of the administration of criminal punishments. For instance prior to 1902 there were various kindred laws passed providing for commutation of sentence, so much per month being

deducted from the prison sentence, to well-behaved prisoners. These laws were inadequate, and in 1902 Congress passed our present commutation statute, allowing so much a month to be deducted from prison sentences, this amount varying according to the length of the sentence, the greatest time allowed being ten days per month, this being allowed for those sentenced for ten years or greater periods, and equal practically to one-third of the sentence; of course this depending upon the observance of the rules of the prison where confined. (Com. S. Sec. 10532.)

These commutation statutes were evidently deemed inadequate, and in 1910, in pursuance of this humane policy, Congress enacted our present parole law. The commutation statute does not apply and can not be availed of by any prisoner sentenced to less than six months. The parole law, on the other hand, does not apply to any except those whose prison sentences are greater than one year and in no event until one-third of the total time has been served. Since the parole law [fol. 34] does not apply to any prisoners sent for a year or less and since the commutation statute does not apply to any sentence of less than six months, it is obvious that a great majority of those given imprisonment sentences in the federal courts receive no benefits or practically none under either of these statutes, and just as obvious, as a fulfillment of such a humane policy, that these statutes combined are wholly inadequate.

It will hardly be contended, at this period of enlightenment in such matters, that those sentenced for a year or less may not in some instances be deserving of the benefits of some such remedial legislation. Two defendants may appear before the Judge, charged with the same offense, shown to have had identically the same connection with it, and one be justly sentenced to six months in the county jail and the other to five years in the penitentiary. One may be a first offender with a blameless life, shown to have been led and

influenced, and the other with a long criminal record, tending to show an inate criminal character. In such a case one punishment would be as great as the other, and who would contend that such remedial legislation should be extended to the five year man and entirely denied to the six months man? Yet up to the passage of the present probation law that was exactly the state of our laws upon the subject, except where pardon or commutation might be granted by the president. The pardoning power in the president of course existed all the while, but for practical purposes, to a man in prison without friends or money, that power was too distant to be reached.

[fol. 35] During the time that Congress was passing these various acts the states of the Union, one after another were passing probation, suspended sentence and similar remedial statutes, showing that public opinion was gradually being crystalized into a favorable attitude towards them, until in 1915, when, it had reached the point that there was a strong public demand upon Congress for such legislation. This humane policy of Congress, this public demand, this advice of the Supreme Court, given in the case in question, together with the realization that all of these laws, touching the subject of relief against unjust punishments and bondage, were woefully inadequate, to my view, brought about our probation statute. Under this law the smallest offender, with the smallest punishment, either by imprisonment or fine, may be a beneficiary. It seems to have been the broad view of Congress that, since the citizen was surrounded with every possible safeguard to prevent his illegal conviction, it was no less important for him to be surrounded with every possible safeguard to prevent the imposition of unjust punishments and the execution of same.

The provisions of the act, pertinent here, are as follows: (Compiled Statutes Sec. 10564 4-5—10564 4-5 C.)

"Be it enacted by the Senate and House of Representatives

of the United States of America, in Congress assembled, That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interest of the public, as well as the defendant, will be [fol. 36] subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: Provided, that the period of probation, together with any extension thereof, shall not exceed five years.

"While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

"Sec. 2. That when directed by the court the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. [fol. 37] Thereupon such probationer shall forthwith be taken before the court. At

any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

It will be readily seen, on the very face of the act, under any construction, that it grants very broad powers to the district courts, going, in certain provisions, far beyond any powers granted to the president or to the parole board. As a single grant of powers to such courts it hardly has a parallel in the history of our legislation, and particularly is this true, if the construction insisted upon by the petitioners for probation under this act is to be accepted. In other words it, in effect, practically gives to the district courts advance pardoning power, in that it leaves it to the discretion of the court whether any sentence at all be imposed, and if imposed, whether its execution be suspended, which alone places upon the courts an awful responsibility, to say nothing of the powers which it gives to assess damages against prisoners, without a trial to determine same, and the power to impose the duty of restitution upon defendants, or to support their wives, children, etc.

From a fair reading of the act the conclusion can not be escaped that Congress did not hesitate to exhaust itself of all the powers it had on the subject, and lay [fol. 38] them upon the courts. On the other hand, if the view of the government, as we gather it from the adjudicated cases, is to be accepted, the scope of this law will be narrowed to a point, where, in a large measure, the humane and wholesome purposes of Congress, in passing same, will be defeated, and the law itself, in usefulness, reduced practically to a nullity. Those respective views will be discussed presently.

The question on which the government and the petitioner

are so sharply at issue here is: Has this court the jurisdiction to grant probation after service of punishment has commenced in a penitentiary?

The cases wherein this statute has been construed are as follows:

Nix v. James, 7th Fed. (2d) 590.
U. S. v. Nix, 8th Fed. (2d) 759.
U. S. v. Chifani, 14 Fed. (2d) 622.
Archer v. Snook, 10th Fed. (2d) 567.
Kriebel v. U. S., 10th Fed. (2d) 762.
Davis v. U. S., 697, 15 Fed. (2d).
Evans v. U. S. District Judge, 12th Fed. (2d) 64.
Mouse v. U. S., 14 Fed. (2d) 202.

The state of judicial opinion as to this law is very much divided, with no opinion by the Fifth Circuit and none by the Supreme Court.

The Ninth Circuit Court of Appeals in the Nix v. James case, in a well reasoned opinion, by Judge McCamant, held the law was applicable and that the remedy [fol. 39] could be availed of by those convicted and sentenced prior to the passage of the act and at terms expiring prior to the filing of the petition. The Seventh Circuit Court of Appeals in the Kriebel case held the same thing and approved the holding in the Nix case, differing only slightly in the reasoning touching the second question. The Sixth Circuit Court of Appeals in Evans v. District Judge, in effect held the same thing, expressly approving the conclusions in the Nix and Kriebel cases.

The effect of the commencement of service of the punishment was not involved in either of these cases and this question was not passed upon by either of these Circuit Courts, the Ninth and Seventh Circuits expressly disclaiming any purpose to do so. No district court, as I recall, has specifically held that the law is not applicable to those convicted

and sentenced prior to the time of the passage of the act, but several have held that the expiration of the term at which sentence is imposed shuts the door to probation. Their holdings to this effect seem, in the main, to rest upon United States v. Mayer, 235 U. S., 55, which holds that the court cannot set aside or alter its judgment after the expiration of the term. The government here insists that if it had been the purpose of Congress to change the rule laid down in that decision that it would have said so in the act. There may have been such an occurrence in our legislative history, but I do not recall where Congress has ever undertaken expresly to repeal any decision. It seems to me to be a sufficient answer to any such contention that there is no such limitations in the statute, but Judge Anderson in the Kribel case points out very clearly that the case [fol. 40] of United States v. Mayer does not apply in this situation and the rule there is not effective, for the reason that a suspension of the execution of sentence does not alter the original judgment imposing such sentence. Though, in this regard, he differs very pointedly from Judge McCamant in the Nix case, I think he is correct. The suspension of the execution of the sentence affects the prisoner and the service of the punishment. The willful release of a prisoner from jail by the Marshal or of a prisoner from the penitentiary by the Warden would suspend the execution of sentence, but certainly would not alter the judgment. The only difference is that what they would do unlawfully, the court itself would do lawfully. The granting of parole is a suspension of the execution of sentence, but of course does not alter the judgment under which the prisoner is held. If he is later returned to prison on account of a violation of his parole the original judgment is fully in effect and the execution of the sentence is then carried out.

As to whether this act is applicable to those convicted and sentenced prior to the act, or its passage, it may be suggested that Congress did not so intend otherwise it would have

said so, as it did in the commutation and parole statutes. Each of those statutes are made applicable to "every prisoner who has been or who may hereafter be convicted" (Comp. St., Sec. 10532 and 10535). So expressly providing in these two statutes rather is evidence to my mind that it is the intent and purpose of Congress that such remedial statutes, all of these being very similar, and the relief provided should be available to those convicted prior to the passage of the act. [fol. 41] The difference between the commutation and parole statutes and this probation statute is, that in the former this purpose is expressed and not left to construction, while in the latter the words used are, "after conviction," which the Ninth and Seventh Circuit holds means the same thing, and I think the difference in this regard is rather due to the difference in the draftsmen that drew the respective bills. Why would Congress so intend in one such remedial statute and not in another? This is after Dr. Cook's conviction. Do you suppose that Congress, inspired by the example of the unjust punishment and the hard bondage of those already convicted, to pass this remedial law, would, at the same time, intend to deny them the remedy and benefits of the law? If the government is right in its contention, all of those persons throughout the United States, convicted on the 4th day of March, 1925, at an hour however prior to the passage of this act, even though not sentenced, would be denied all relief under this law. Such would be a harsh purpose, and if it required a liberal construction in order to avoid such an unjust result, should be resorted to.

In the government's brief in Ex Parte U. S., Vol. 242, page 32, we find, "Humanitarian arguments do not touch the question of power or affect the necessities of preserving the constitution. Ample relief may be afforded by enlarging the general parole law. Judicial suspension opposes teachings of advanced criminology, with which the government is in entire sympathy."

If this may be taken as the government's attitude now [fol.

42] it is needless to say that it is out of harmony with American opinion on the subject, as evidenced by the action of the various states, as well as of Congress in passing this law. Humanitarian considerations are at the base of this statute. Congress rejected the advice of the government by undertaking to provide ample relief against the injustices under the old system, not by enlarging the powers of the parole board, but through judicial suspension, and evidently thought when it passed the present Act, to do so, was in line with teachings of advanced criminology. It was evidently the purpose of Congress to cover all of the deficiencies of previous laws touching the subject by a broad and far-reaching system of judicial suspension. These widely divergent views of Congress and the government, as expressed in its brief, must be kept in mind when we come to construe this statute.

The attitude of the executive branch of the government seems not to be very much changed, if any, since the case of Ex Parte v. the United States, as we gather that attitude from the various positions taken by the government in the cases arising under this law. For instance, again touching the effect of expiration of terms of court, it was, in effect, the attitude of the government in both the Nix and Kriebel cases that the right to seek probation under the law was lost because appeals were taken by those defendants from the convictions obtained. Congress is to be credited with knowledge of the practical operation of the courts, both trial and appellate, under the procedural laws, and to know that in the event of appeal that in all probability the terms of court, during which the defendant was convicted, will have [fol. 43] expired before the appeal is disposed of. The law of course applies to those pleading not guilty and convicted, as well as to those pleading guilty. It certainly was not the purpose of Congress to suppress appeals of those feeling aggrieved by conviction, nor to penalize those who seek redress from the wrongs they conceive have been done them by the courts, by an appeal of their cases. To hold that the door of pro-

bation under this statute is shut to a man because of the expiration of the term at which he was convicted and sentenced, in practical effect, would be depriving almost every man of the benefits of the law who dared appeal his case. Suppose a juvenile is convicted, being of the class primarily intended to be chiefly the beneficiaries of this statute, and his guardians or parents feel so aggrieved that they appeal his case. In almost every such case, considering the duration of the appeals and the length of time customarily taken to dispose of them, if such a construction was applied as contended for by the government, such juvenile would be deprived of all benefits under the law and the trial court would be helpless, however deserving the cause, to grant any relief under the act. Certainly such should not be the construction of the act unless its words plainly demand such construction. Such a situation as I have described would have the bare technicality of a closed term of court defeating the very purposes of Congress.

Now let us consider what could come, under the practical operation of this statute, from similar technicalities, if the law is finally to be construed as not applicable where the service of punishment has commenced. [fol. 44] The deprivation of worthy persons of probation on bare technicalities, is certainly to be abhorred and to be avoided, if it may be, by a reasonably liberal construction of the act. In this connection, also, Congress certainly knows the practical operations of the trial courts with respect to the passing of sentences. This was the subject dealt with in the Act. The customs of judges vary slightly. Two methods are generally followed. One court will sentence during the trial of the criminal docket and as rapidly as pleas of guilty and convictions are had, sentence will be immediately imposed and the prisoners, as they are passed upon, are taken charge of by the Marshal. Another court will follow the practice of having sentence day, at which time all of the defendants convicted during a week, or during a term, will be called up on one day and sentenced

one after another. I have followed both methods, varying with the circumstances. The congestion of the criminal dockets of the Federal Courts at this time is a matter of common knowledge. I have had more than fifty men appear before me during one sentence day. I have heard of some district courts passing on nearly a hundred in one day. I have had these sentence days in my experience come on the last day of the term. Now it will be readily seen that where there are great numbers of defendants coming before a court, that it is absolutely necessary that the court and all connected with the court work with the greatest possible speed to dispose of the business. The same situation of necessity of quick action confronts the judge who follows the practice of sentencing defendants during the trial of the docket, and as rapidly as [fol. 45] defendants enter their pleas of guilty or are convicted. Many of the defendants appearing in the federal court are not represented by counsel, not acquainted with the law or their rights and the majority of them are greatly embarrassed, are inclined to say little in their favor, and juveniles particularly are generally reticent. Either situation, where there is a great deal of such business confronting the court, makes it impossible to devote much time to hearing extended reports as to the history of the defendants, or for the judge himself to go into extensive examinations of defendants. On occasions where there are but few defendants the practice is otherwise and careful examinations of defendants are made. Of course the punishment, in a great majority of cases coming before the federal courts, is by either fine or imprisonment in jail. In other words the class receiving no benefits under the parole law and no benefits under the commutation statute, except those sentenced between six months and a year.

In the common run of cases where there is a congestion of business as described, the judgment of the court as to sentence is based upon the appearance of the defendant, the brief statement made, but largely upon the character of

the offense, the incidents connected therewith and the manner of its commission, etc. Take a case where the punishment is by fine, the prisoner goes immediately into the hands of the court bailiff and upon default of the payment of fine goes into the hands of the Marshal, just beyond the court room door, and commences instantly the service of his punishment. In the case of a defendant sentenced to jail he immediately [fol. 46] commences to serve his sentence when placed in the hands of the Marshal. Great latitude is allowed to United States District Judges in the matter of imposing punishment, ranging in a great majority of cases from a possible low fine to months in jail or years in the penitentiary. Defendants, where they contest their cases do not know in the first place that they are to be convicted, and in the second place, have no idea possibly of what their sentence is to be. The latter is true with respect to those entering pleas of guilty. They do not know whether they will be satisfied or displeased with the punishment or whether they would desire to seek probation at the hands of the judge.

The Sixth Circuit Court in the Evans case practically holds that the Act intends only that probation shall be granted as a voluntary matter on the part of the court and without application. I am not able to see any such limitations in the statute itself, and of course it is perfectly proper for the defendant to make application and for the court to hear it, where it has jurisdiction to do so. Now if any such defendants, receiving fine or jail sentences, should come back the next day, or within five minutes, for that matter, they can and will be met with the technicality that the service of their punishment has commenced and that the court is without jurisdiction. Now if the Supreme Court is to finally hold that this law is not available to any such defendants after the service of punishment has commenced, then, any one who knows the practical operations of the United States District Courts, as they are conducted today, will readily see that a majority of [fol. 47] those really intended to be the

beneficiaries of this remedial legislation will be denied any benefit under it, because they are not deserving, no, but because of the technicality of service of punishment commenced. That such was the purpose of Congress, if it did contemplate such practical results, is unthinkable. It is wholly inconsistent with the very act of passing such a statute.

I wish to emphasize this point right here with an actual occurrence in my court, since this law has been in effect. A woman about thirty years of age, with a good countenance, appeared in my court and entered a plea of guilty to the illegal possession of intoxicating liquors, consisting of whisky, beer and a variety of other liquors. My examination of her developed that it was her first offense, and though she was not charged with a sale, that she had these liquors for the purpose of sale and had been selling them, stating and explaining that it was in order to make a living for her children, etc. This is the common story of bootleggers, and the circumstances being conclusive that she had been selling liquor, I presumed she had the funds to pay a reasonable fine and assessed against her a fine of $250. She immediately passed into the hands of the bailiff and at the court room door, upon default of the payment of the fine, passed into the custody of the Marshal, to be taken presently to the county jail. When in the Marshal's office, being detained with other prisoners, and relieved somewhat of the embarrassment naturally incident to an appearance in a crowded court room, and realizing that she was actually imprisoned, it seemed she commenced to talk freely of her situation, and to relate fully facts that [fol. 48] would bear most persuasively in behalf of probation. In about twenty minutes the United States Attorney appeared before me and requested the privilege of suggesting probation for this defendant. The substance of the facts revealed by the District Attorney was that she had no money, was in great distress, facing the necessity of going to jail to serve out the fine; that her husband had deserted her; that she had three small children then at home, with no

one to earn for them, one a baby, sick in bed. Of course neither the probation law nor the commutation statutes applied to her case, and pardon was out of the question. The only remedy available would be the making of a pauper's affidavit, upon the making of which at the expiration of thirty days in jail she might be released. I reminded the District Attorney of the fact that she had served some twenty minutes of her sentence and that being true, if the position insisted upon by the government in this regard was correct that I was without jurisdiction to grant her any relief. But, of course, I agreed to take up the matter and consider probation for her.

It may be suggested in such cases, so deserving of consideration under this statute, and where the time of service is so slight, reducing the objection to a bare technicality, that the court would be warranted in so treating it and doing substantial justice in the matter. But such, if the government's construction is to be accepted, would not be following the law, and the judges are sworn to uphold the law, and any practice of usurpation or abuse of power by the courts should be frowned upon, as being essentially dangerous.

[fol. 49] On the other hand, there is more likelihood and much more likelihood of mistakes being made in the matter of the sentence imposed than in the matter of conviction. I recall one case, since this law has been in effect, where I sentenced a man, along with other defendants, to a year in jail. After the service of punishment had commenced, upon disclosures made by defendant's counsel and by government's counsel, I was convinced that a mistake had been made and suspended ten months of this time. There is no need going into detail but this action was absolutely warranted, the facts demanded the correction of the mistake. This law contemplates just such flexibility in the administration of criminal punishments.

Under the law, even during term time, after service of sentence is commenced, the District Court is without author-

ity, not only to increase the punishment, but as well without authority to diminish same. In re: Lange, 18 Wall. 163. Corpus Juris, Vol. 16, p. 1313-14. This statute does not authorize a change in the judgment sentence, after its service has commenced, but provides the remedy through suspension of execution.

Prior to the passage of this Act there was absolutely no remedy or relief against such unjust punishments, whatever they might be due to, except pardon. In the matter of the administration of criminal puniahments, prior to this statute, such illustrations shown, the law has been most rigid and inflexible. It seems it was the purpose of Congress to make such administration to the last degree elastic.

[fol. 50] Now suppose there is a judge on the bench, who, like the government, is opposed to the principle of "judicial suspension," any such judge could absolutely foreclose the issue of probation by refraining from exercising any of the authority granted by the Act at time of sentence by ordering defendants one after another, as sentenced, into the custody of the Marshal. Any such defendants could be met with the technicality that the court was without jurisdiction, since the service of punishment had commenced. Such a course of conduct would not be subject to revision by any appellate court. Thus every judge would have the power of raising a legal barrier not only against probation, but against a hearing of any pleas or applications for probation, despite the purposes of Congress, on the ground of no jurisdiction.

Now if the construction is finally placed upon the statute that would give authority to hear this woman's plea for probation after her service of twenty minutes of punishment, then it follows and must be held that the court has the authority to suspend the execution of punishment, where the service of it is in a penitentiary. No distinction can be found in the law between the service of the punishment in a jail or in the custody of the Marshal and in the penitentiary,

or the custody of the warden of same.

Judge Sibley, in the case of Archer v. Snook, 10th Fed. (2d) 567, where this identical question was involved, said: "I am convinced that such procedure, at least in the case of a penitentiary sentence, is unwarranted. [fol. 51] Penitentiaries are at a great distance from most of the judges. It would involve much complication to place persons on probation after arrival at the penitentiary." There is an inference in this statement that in practical operation it might be well to construe the law one way as applied to jail sentences, and another, as applied to penitentiary sentences. I am not able to see any such distinction in the law. And as to the distance from the judges, it is no farther to send a man to the penitentiary than it is to bring him back from the penitentiary. Though the Leavenworth Penitentiary is in Kansas and beyond the boundaries of Texas, yet it was upon the judgment of this court that the petitioner was placed in the penitentiary, and it is only upon the authority of this court and upon no other authority that he is held in the penitentiary. It is the commitment of the court authorizing his confinement there, and the judgment behind it, and of course here it is certainly not to be questioned that Congress has the authority to delegate to the court the power to take from, as well as to place in, penitentiaries, even though beyond the territorial jurisdiction of the court. This court has sentenced people to prisons located in almost every section of the United States. This is true, I am sure, of almost every district court. And too, prisoners in the penitentiary are not in charge of private individuals or corporations, but are under the control of the executive branch of the government. Any such judgment granting probation would need only to be recognized by a co-ordinate branch of the government.

Judge Sibley, when the above case was first presented, [fol. 52] entertained the view that the statute did authorize the district courts to exercise this authority after the service of

punishment had commenced in the penitentiary, but reversed himself when the application was actually presented.

Judge Jacobs of Arizona, in the Chafina case, 14 Fed. (2d), 622, held that such authority, by the Act, was vested in the district courts, and stated, "To hold otherwise, would be as is said in the case of Nix v. James, 7th Fed. 590, reading into the Act a limitation on the power granted, not written there by Congress. I am of the opinion that the Act clearly vests power in the trial court to admit a defendant upon probation at any time after conviction, either before or after service of the sentence has commenced, and before the full term of the sentence has been served."

Judge James, of the Southern District of California, when the Nix case was first presented, entertained the view that the district courts were not given such authority, but after the case was passed upon by the Ninth Circuit, though that specific question was not raised or passed upon, later construed the opinion of the Ninth Circuit Court of Appeals in the case to mean that the District Court was granted a continuing control over the matter of punishment and the amount of punishment that was finally to be meted out, etc., and in effect held that the District Court had such authority, as is conclusively shown by the fact that at the time he finally passed upon the application of the party Nix for probation, he indicated that, after a certain part of the [fol. 53] punishment had been served he would then entertain the application for probation. U. S. v. Nix, 8th Fed. (2d), 759. If the court was without such authority, its declaration, at the time of passing sentence, or at the time of passing upon the application for probation, of an intention to hear and grant probation after the service of a certain period in the penitentiary, would in no manner affect his right to do it. The court, nevertheless, would be without such authority.

It has been held in several Nebraska cases, unreported, that the district courts have such authority.

Judge Youmans of the Western District of Arkansas, in Davis v. United States, 15th Fed. (2d) p. 679, and Judge Pollock of Kansas, in the case of Mouse v. United States, 14th Fed. (2d) 202, hold to the contrary view, and that the suspension of the imposition or execution of sentence intended was applicable to that period between conviction and the beginning of the execution of sentence.

Judge Pollock in his opinion suggests, that to hold otherwise would be to permit the courts to invade the penal institutions of the country at any time during the term of imprisonment, and after all jurisdiction over the subject matter and the person of the offender has been lost. One of the very questions involved here is whether a continuing jurisdiction over the subject matter and the person of the offender has been granted, through this Act, to the district courts. I see no occasion for any note of alarm to be sounded because of the district courts being granted the authority to "invade the penal [fol. 54] institutions" and to release prisoners therefrom, if the welfare of the public and of the prisoner demand it. The district courts have alone the authority to place prisoners in penal institutions. Congress has not seen fit to place that power elsewhere, or even supervision of it with appellate courts or any other branch of the government, and under the latitude of punishments provided, it is in almost every case a matter of discretion with the courts whether the prisoner be confined in a penal institution. Expressed in the same way, the President, under the pardoning power, is granted the authority to invade such institutions and to empty them of their prisoners. The Parole Board, in a limited way, is granted the same authority. Congress itself has taken a hand in emptying the prisons through the commutation statutes. Even the Attorney General, without consulting the President, upon the mere application of the warden, is authorized to restore commutation to a prisoner who has lost same through bad conduct. (Comp. Stat. Sec. 10533.) And now comes the probation statute which, under

any construction, in some respects, goes far beyond any powers heretofore granted. It would seem from this general distribution of power, touching the subject of taking men from prison, that Congress was as much concerned in taking prisoners out as it was in putting them in. On the part of the Judge, it is more responsibility to send men to the penitentiary than it is upon any authority to take them out. Now these respective views as to the proper construction of this Act, touching the intent of Congress, are as widely divergent as the North is from the South. Really the [fol. 55] district judges are the ones to become alarmed if this very great responsibility is to be added to those they already have. The position could not be very well maintained in reason that the District Court, where the power to punish is exclusively lodged, would not also be a safe depositary of the power to end such punishment, and particularly in view of the personal contact and the personal observation of the trial judge of the defendant at the trial and of the incidents connected with the commission of the offense and particularly with the safety limitations provided in the Act itself, touching probation, its modification, revocation, etc.

The most common reason assigned, both by the lawyers and the courts, to support the view that the power cannot be exercised after the execution of sentence has commenced is, that such cases are covered by the parole law; some suggesting that the exercise of such power by the district courts would be in conflict with the parole authority. I am not able to accept these suggestions. As heretofore said, the parole law does not cover and has no application to the great majority of the cases sentenced to imprisonment in Federal Courts. It might be held, in a sense, to cover this petitioner's case, since if he lives some eighteen months or two years he will reach the point of eligibility to parole. At this time the parole law does not cover the petitioner's case. Now, on the other hand, there appears to be conflict, between such an exercise of authority by the courts and the parole

board, but rather the exercise of concurrent authority, insofar as the powers are the same, or similar. There is no conflict except where one power is made exclusive. [fol. 56] Of course with this construction, that the power may be exercised after the commencement of service of punishment, there would be in it in no sense a repeal of the parole power and such course was not the intent of Congress.

The President has the power of commutation of sentence; the Congress has exercised this power through its fixed statutes, working automatically to commute the sentence, conditioned only upon the observance of the rules of the prison. The Parole Board, in effect, exercises the same authority and even the Attorney General, in a limited way, exercises the authority of commutation. It has never been held that there is any conflict of authority here, but only that the authority is exercised concurrently by these different branches, or officials, of the government. The authority of the parole law is based upon the assumption that the prisoner, when he has served one-third of his time, and not before then, will have reformed, that the objects of punishment at that time will have been accomplished; and that the prisoner may then be trusted upon his verbal promise to obey the laws and respect the conditions of a parole. It could have been the purpose of Congress that this presumption, as is the case with the presumption of innocence, could be overcome by evidence, prior to the expiration of one-third of his sentence, showing he had reformed; that the objects of punishment had been attained, that he was worthy of such a test and trial, as is implied in probation, and that in such event the prisoner's punishment should cease. Certainly if such were the case further punishment would be [fol. 59] unjust, and the prime purpose of the law is to relieve against unjust punishment.

Also, it could have been the purpose of Congress that the trial judge, whether the service of punishment was in jail or in the penitentiary, should have the authority to relieve

against unjust punishments, due to mistakes in sentence. The trial judge has the intimate view of the prisoner, he sees him at the trial, he observes his conduct, and has an acquaintance from the lips of witnesses with the incidents connected with the commission of the offense, the manner of its commission, etc. The Parole Board, two of them being the Warden and the Physician of the penitentiary, have not the view of the court, but a view of the prisoner and his conduct while confined. The President, in the exercise of his commutation powers, has neither the view of the trial court nor the Parole Board, but his, supposedly, is a paper view. This power, ever so wisely exercised by each authority, might reach entirely different judgments, on a given case.

If Congress has seen fit to give three opportunities for the prisoner to obtain relief against unjust punishment, that is a matter with Congress. As a matter of safeguarding prisoners against unjust punishment, such an authority vested in the district courts, as well as in the Parole Board and the Attorney General and the President, could hardly be successfully attacked as being unwise.

But whether Congress considered the point and actually had the purpose to grant such authority is not [fol. 58] controlling at all. The words must be looked to, and it is commonly known that the framers of legislation often insert a word, the probable construction of which is understood by the proponents of the legislation, but which construction and the inevitable results escape entirely the thought and notice of a majority of the members of Congress. Were I privileged to judge as to the intent of Congress, by matters outside of the Act itself, the reports of the committees and the arguments on this bill, I would rather suppose that such was not the intent of Congress. We are reminded here, however, that Congress in passing what is commonly known as the White Slave Traffic Act did not intend, at least it was commonly understood that Congress did not intend, to cover personal escapades between men and women, but such was the construc-

tion given to the Act by the Supreme Court in the Caminetti case, 61 Law Ed. 442. In that case the Supreme Court said:

"It is contended that the Act of Congress is intended to reach only commercialized vice, or the traffic in women for gain, and the conduct of petitioner, however reprehensible in morals, is not within the purview of the statute, when properly construed in the light of its history, and the purposes intended to be accomplished by its enactment. It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body that passed it, the sole function of the court is to enforce it according to its terms. Where the language is plain and admits of no more than [fol. 59] one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meaning need no discussion."

The Supreme Court again, in Hamilton v. Rathbone, 44 Law Ed. 219 said:

"But where the Act is clear upon its face, and when standing alone, it is fairly susceptible of but one construction, that construction must be given to it."

Justice Brewer, speaking for the Supreme Court, in Holy Trinity Church v. United States, 143 U. S. 457, said:

"The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language he has used * * * * * No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Thus it is made plain that in seeking the meaning of Congress, in the main, we must look to the language of the Act, and by judicial construction no limitations should be added which are not found in its language; also that contingencies,

that before or after the service of sentence has commenced and as long as the full term of the sentence has not been served.

Though it may not be of much importance, let us look for a moment, to the significance of the word "when," as used in the statute. Its meaning may be varied, depending in each case upon the connection in which it is used. For instance, here it could have the significance of "if," reading "if it shall appear," etc. Had the word "if" been used instead of the word "when" it would better sustain the position of the government that this authority must be exercised at the time the judgment is pronounced. It may mean, on the other hand, the same as the words "in the event," reading "in the event it shall appear," etc. Of course, used alone as an interrogative it means "at what time." In other connections it might have the meaning and does have the meaning of the words "at any time." That, to my view, is its significance and the construction to be given to the word as used here, and if so, we have the statute in question reading, "at any time after conviction it shall appear to [fol. 63] the satisfaction of the court, the court shall have the power, etc.," and free of any limitations, so long as the service of sentence continues.

Now the construction applied and the reasoning to support that construction, by the Ninth and Seventh Circuit Court of Appeals, in the Nix and Kriebel cases, holding the law applicable to defendants convicted prior to the passage of this Act, and at terms of court expired before the petition for probation is filed, apply with equal force, and I think are even more cogent in supporting the proposition that the power of suspension of the execution of sentence may be exercised after the service of same has commenced. Each court expressed a disclaimer of any purpose to so hold, but let us look to the construction and the reasoning applied by the courts in those cases.

Judge McCamant, in speaking for the court in the Nix case, says:

"The statute plainly contemplates that in cases falling within its purview the district court shall retain control of the punishment to be meted out after sentence is pronounced and after the expiration of the term."

Certainly, in the absence of a limitation to that effect, it would not take a more liberal construction to hold that the statute also plainly contemplates that those may be beneficiaries of the Act who are serving sentences that should not have been pronounced against them. Upon what theory can it be held that Congress would intend that the sentence should be suspended after it was pronounced, presumptively, of course, upon [fol. 64] the theory that to enforce it would be unjust, and yet at the same time intend that the poor fellow who might per chance be serving out such an unjust sentence could not be a beneficiary under such remedial statute.

Again, Judge McCamant said, after quoting those provisions of the statute with respect to the authority to revoke or modify any condition of probation and to impose certain duties upon the defendant, such as the payment of damages, the support of those legally dependent upon the defendant, etc., as follows:

"These provisions of the statute clearly authorize the District Courts to modify from time to time the sentence imposed on a defendant, even after the expiration of the term at which sentence is pronounced. It may be suggested that these provisions of the statute are applicable only to the cases of defendants who have been put on probation at the time when sentence is imposed. The general power is granted to suspend the execution of sentence and to place the defendant upon probation. We do not think the power is lost by a failure to exercise it when judgment is pronounced."

If this is a correct interpretation, the inquiry naturally

arises, why should this power be lost, without any limitation requiring it, to the prisoner who is actually serving a sentence that either should not have been imposed upon him in the first place, or which should have been suspended after it was imposed.

Again he said: "The statute does not expressly exclude from the benefit of its provisions defendants who [fol. 65] have been sentenced to imprisonment at terms which expired prior to its enactment. The new power vested in the District Courts is available to them after conviction or after a plea of guilty or nolo contendere. THE STATUTE DOES NOT SAY HOW SOON AFTER CONVICTION OR PLEA THE POWER MUST BE EXERCISED. In view of the liberal construction to which this statute is entitled, you cannot read into it a limitation on the power granted not written there by Congress. Exceptional conditions justifying an abatement of criminal penalties may arise in the cases of defendants situate as is this petitioner. In other words, defendants sentenced at terms which expired prior to March 4, 1925, and who have not yet been imprisoned, may come within the mischief that Congress intended to remedy, and we should not by construction exclude them from the operation of the statute. The fifth section of the Act provides that it shall take effect immediately."

I again suggest that it certainly could not have been the purpose of Congress to permit an abatement of such criminal penalties, imposed prior to the passage of the Act, because, to impose them would be unjustified, and yet intend that in the case of the prisoner who was actually serving such unjust criminal penalties, the relief should be denied. The statement of Judge McCamant, that, "*The statute does not say how soon after conviction or plea the power must be exercised,*" certainly applies with equal force to the proposition that the power may be exercised after the service of punishment has commenced. Why should such liberal construction be [fol. 66] applied to save the prisoner who has never suf-

fered and deny this same salvation to the prisoner who has? It is incredible that it was intended by Congress to make any such discrimination.

A strong position can be taken that the words "after conviction" or "plea of guilty," as used by Congress, are prospective and not retrospective, and that Congress in using them was undertaking to deal with cases arising in the future, and requiring a liberal construction, to include within it those convicted prior to the passage of the Act and at terms of court expired. To reach the conclusion I have, as to the effect of service of punishment, does not require that liberal construction. Though the words are prospective and intended to deal with future cases, the matter of suspending the execution of sentence after service commenced would come plainly within them, certainly where that service was commenced, as in the case of this petitioner, subsequent to the passage of the Act.

Judge McCamant cited the case of Somers v. Johnson, 4th Vermont, 278; 24 Am. Dec. 604. This case involved the construction of a statute intended to relieve persons in prison for failure to pay debts. The words used and construed in that statute were, "Whenever any person is imprisoned," instead of, as in this statute, "after conviction." The Supreme Court of Vermont held that those words included those in prison prior to the passage of the Act, and this construction effectively supports the construction of Judge McCamant that the words "after conviction," include those convicted prior to the [fol. 67] Act. Judge McCamant, in quoting from this decision, included the following: "Any man is in prison each moment from the time of his commitment, to the time of his discharge; and there is no reason to believe that the Legislature intended to provide relief for those, who should afterwards be committed to prison, and leave in perpetual imprisonment those whose hard bondage alone dictated the necessity of the statute." In the Nix case where this was cited with approval, the defendant had not served any of the

punishment. This quotation and the reasoning of the Vermont Court is especially applicable to the present case, since the petitioner suffered more than a year of confinement in jail prior to the passage of the Act and pending the appeal of his case, and has served on his sentence nearly two years, commencing immediately after the passage of the Act.

Judge Anderson, in the Kriebel case, also disclaims any purpose to hold the Act applicable to cases after the beginning of punishment, but the reasoning in that case also, with equal force, to my view, supports the proposition that the authority may be exercised after punishment commenced. For instance he says,

"We are concerned here with a grant of power. The statute fixes a time when the exercise of it may begin, providing that it may be done "after conviction or after a plea of guilty of nolo contendere, but there is no limitation in the statute that it shall not be exercised after some other event."

There is no limitation here that in the event punishment is commenced the right to probation is lost. [fol. 68] There is certainly no reason, outside of the words of the statute, that any such thing should be held. The event, upon the happening of which the authority may be exercised, after conviction, is, that it appear to the satisfaction of the court that the ends of justice and the interest of the public and the defendant will be subserved. Regardless of whether Congress considered and had the specific purpose that the Act so operate, reasoned from matters outside of the statute itself and the reports and arguments touching this measure, I am not able to give any interpretation to the words used other than that it includes among its beneficiaries those suffering their punishments.

Now, touching the merits of petitioner's application. He was undoubtedly guilty of the offense charged and deserved punishment; how much punishment I do not know. The truest and most dependable tests of punishment are:

First: Does the punishment attain the objects intended?

Second: Does public opinion, after an acquaintance with all of the facts, and after due deliberation, approve of the punishment? This petitioner having laid claim to the discovery of the North Pole, at the time of his trial and conviction and sentence, was nationally and internationally known, and naturally the case, and the incidents of the trial attracted wide notice. After the trial was over and the sentence was imposed we were able to get the editorial opinion of the country as to this case. That opinion almost universally was that the [fol. 69] punishment of 14 years and 9 months imposed upon a man of the age of this petitioner was excessive, to say nothing of the $12,000 fine. And speaking of local sentiment as to this punishment, I candidly believe if the matter was submitted to a vote of the people of Texas, that 99 out of 100 would vote a disapproval of this punishment. I also have regarded this punishment as excessive from the time it was imposed. At the time of the petitioner's trial, the public mind was inflamed against that class of offenders who were using the mails to defraud in connection with the promotion of fraudulent oil schemes. This sentence to some degree reflects that state of mind, but I know judicially that the greater reason for the imposition of such an extreme punishment in years, was due to the fact that Judge Killits believed at the time he sentenced the petitioner, that he had stored away great sums of money. He so stated. If this assumption had been true, there would have been more warrant for such a sentence, but subsequent developments have disproved the correctness of that theory. After the sentence was imposed and notice of appeal given, a supersedeas bond was required of the petitioner, which had the effect when signed to hold the sureties bound to pay, in the event the case was affirmed, the $12,000 fine and the cost of the case, which amounted to a greater sum. The petitioner was not able to make this bond for the reason that he had no money, and though he had friends, the respon-

sibility was too great and he was not able to get sureties. As a result he made a pauper's affidavit and appealed his case. To my personal knowledge he remained in jail [fol. 70] from the 21st of November, 1923, until in April, 1925, pending the appeal of his case, and until it was affirmed. It is also within my personal knowledge that this confinement in jail almost resulted in the petitioner losing his life at one time during that period. Any rational person would certainly conclude that if a man had great sums of money stored up, and particularly a man of the career of the petitioner, that certainly he would not have remained in jail to almost die from the results of confinement pending the appeal.

The petitioner is about 61 years of age, and to be required to serve out this punishment would carry him to around 70 and in all probability would mean that this sentence was a life sentence. Under my view, the petitioner, by his service in the jail, and in the penitentiary for nearly three years and a half, has suffered sufficiently for his crime. He will suffer disgrace to some extent under probation.

Though probation is granted for five years, the petitioner, after that period, unless granted relief by the President, must return to the penitentiary. Believing, as I do, that the petitioner has been punished sufficiently now, I will suspend the execution of petitioner's sentence, and place him on probation for five years, with Judge Erskene Williams of Fort Worth, as special probation officer in this case, the conditions of such probation to be worked out and included in the judgment.

[District Court Clerk's Certificate omitted.]

[fol. 71] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:-

ARGUMENT AND SUBMISSION

extract from the Minutes of April 20th, 1927.

United States of America

No. 5056. versus

Frederick A. Cook

On this day this cause was called, and, after argument by Henry Zwiefel, Esq., United States Attorney, for plaintiff in error, and H. C. Wade, Esq., and Sam R. Sayers, Esq., for defendant in error, was submitted to the Court.

[fol. 72] OPINION OF THE COURT

Filed June 14th, 1927.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 5056

United States of America, Plaintiff in Error,

versus

Frederick A. Cook, Defendant in Error.

Error to the District Court of the United States for the Northern District of Texas.

Henry Zwiefel, U. S. Atty., (Henry Zwiefel, U. S. Atty., and J. Forrest McCutcheon, Asst. U. S. Atty., on the brief), for Plaintiff in Error.

H. C. Wade, and Sam R. Sayers, (Herbert C. Wade, Sam J. Callaway and John E. McGinness on the brief), for Defendant in Error.

Before WALKER, BRYAN and FOSTER, Circuit Judges.

WALKER, Circuit Judge: In November, 1925, Frederick A. Cook was convicted in the United States Court for the Northern District of Texas, under an indictment charging him with using the United States mails in executing a scheme to defraud, and was sentenced to serve in the United States Penitentiary at Leavenworth, Kansas, a total of fourteen years and nine months, and to pay a fine of $1,000.00 on [fol. 73] each of the twelve counts on which he was con-

victed. That judgment of conviction was affirmed by this court in February, 1925. Pursuant to an application made by Cook in February, 1927, while he was confined in that penitentiary and serving the sentence of imprisonment imposed upon him, the court in which he was convicted made an order suspending the execution of said sentence, revoking the order of commitment under which Cook was held in the penitentiary, and placing him on probation for a period of five years.

The court was without power to make that order unless power to make it was conferred by the Act of March 4, 1925, entitled "An Act to provide for the establishment of a probation system in the United States Courts, except in the District of Columbia." 43 Stat. 1259. The power to place upon probation is conferred by the following part of Section 1 of that Act:

> "That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: Provided, That the period of probation, together with any extension thereof, shall not exceed five years."

It is not to be doubted that a principal purpose of that

Act was to confer on designated Federal trial courts the power to suspend the imposition or execution of sentence in criminal cases, the lack of which power was strikingly brought to public [fol. 74] notice by the decision in ex parte United States, 242 U. S. 27. The enactment of the statute was evidence of the conclusion of the lawmakers that the trial courts mentioned should have the power, by suspending the imposition or execution of sentence, and placing the defendant on probation, to give him an opportunity to prove by his conduct that the ends of justice and the best interests of the public, as well as the defendant, will be subserved by postponing the imposition or enforcement of the penalty for the offense of which he was guilty. That statute cannot properly be given the effect of changing the law which was in existence when it was passed except so far as the language used discloses an intention to make a change. The law then in existence included the rule that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term, or the court's control of the case in which the judgment was rendered is retained in some authorized way, (United States v. Mayer, 235 U. S. 55; Ex Parte Lange, 18 Wal. 163), the Parole Act, providing for the release on parole of prisoners convicted of an offense against the United States and confined in a United States penitentiary or prison in execution of a judgment of conviction for a definite term or terms of over one year, or for the term of his natural life, (36 Stat. 819, 37 Stat. 650, Comp. Stat. §§10535, et seq.), and other statutes providing for the release of prisoners before the expiration of the terms of imprisonment for which they were sentenced. Comp. Stat. §§10529, et seq.

Nothing in the Probation Act indicates an intention to change the law as to the effect of the expiration of a term of court on the court's control or jurisdiction of a case in [fol. 75] which a final judgment was rendered during that

term. The statute is in the usual form of one conferring a new power on a court with respect to cases that may be pending before it for judicial action. Certainly it is not ordinarily to be implied that a power so conferred is exercisable in a case which has passed beyond the court's control by the rendition of a final judgment and the expiration of the term during which such judgment was rendered. The language used in conferring the power to suspend the imposition or execution of sentence, and to place the defendant upon probation, "after conviction or after a plea of guilty or nolo contendere," is entirely consistent with the absence of any intention to authorize the exercise of that power after the expiration of a term during which a final judgment of conviction was rendered. It well may be inferred that the language of the Act would have been different if the lawmakers had intended to change, as to the subject dealt with, the law with respect to the effect on a court's jurisdiction or control of a case of the expiration of the term during which that case was disposed of by a final judgment.

Nothing in the language of the Probation Act indicates an intention to change or add to the existing laws on the subject of releasing, before the expiration of the time for which they were sentenced, persons confined in execution of judgments of conviction of offenses against the laws of the United States. Before that Act was passed Congress, by the enactment of the Parole Act and other statutes above referred to, had adopted a plan for dealing with that subject. Those statutes disclose the intention of the lawmakers with reference to shortening terms of confinement entered upon by convicted [fol. 76] persons. To that end limited powers are conferred. In view of the existence of those statutes and of the absence from the Probation Act of any reference to them or to the subject of releasing from imprisonment persons who have already begun to serve sentences imposed, the conclusion is warranted that the lawmakers did not intend the Probation Act to empower the courts mentioned to make

such an order as the one now in question. If the Probation Act authorized the making of such an order each court exercising the power granted may, as to any imprisoned convict, set at naught the limitations and restrictions of the Parole and commutation statutes, leaving the system established by those statutes in force only so far as each of the courts mentioned, in the exercise of an unrestricted discretion, may permit it to remain in force. We do not think that the language of the Probation Act justifies the conclusion that it was intended to deal with the subject of releasing from imprisonment a person confined in execution of a judgment of conviction rendered at a term of court which has expired, or that it changed, modified, or to any extent repealed or superseded the statutes dealing with that subject.

Very conflicting views as to the meaning and effect of the Probation Act have been expressed by the different courts which have had occasion to consider it. We shall not attempt to comment on the opinions which have been rendered on the subject. The following are some of the cases referred to: Nix v. James, 7 Fed. (2d), 590; Nix v. United States, 8 Fed. (2d), 759; Kriebel v. United States, 10 Fed. (2d), 762; Evans v. District Judge, 12 Fed. (2d), 64; Chafina v. United States, 14 Fed. (2d), 697; Archer v. Snook, 10 Fed. (2d), 657; [fol. 77] Morse v. United States, 14 Fed. (2d), 202; United States v. Young, 17 Fed. (2d), 129.

The order under review is reversed, and the application in pursuance of which it was made is denied.

Reversed and rendered.

[fol. 78] JUDGMENT

Extract from the Minutes of June 14th, 1927.

United States of America

No. 5056. versus

Frederick A. Cook

This cause came on to be heard on the transcript of the

record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court, that the order under review is reversed, and the application in pursuance of which it was made is denied.

[fol. 79] [Certificate of Clerk of U. S. Circuit Court of Appeals, Fifth Circuit, omitted in printing.]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
SEP 12 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, A. D. 1926

No. 539

FREDERICK A. COOK, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

REPORTED BELOW 19 Fed., (2nd), 626, (C. C. A.).

PETITION FOR WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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CALLAWAY & WADE
PETROLEUM BUILDING,
FORT WORTH, TEXAS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926

No.

FREDERICK A. COOK, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT

Reported Below 19 Fed. (2nd), 826, (C. C. A.)

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Because recently, at a session thereof, held at New Orleans, Louisiana, on the 14th day of June, A. D., 1927, in an action wherein your Petitioner is Defendant in Error and Respondent is Plaintiff in Error, the United States Circuit Court of Appeals for the Fifth Circuit passed and entered a final order and judgment wherein grevious error was committed to the rights claimed by your Petitioner, all as shown by the transcript of the

record and proceedings of said Court filed herewith, your Petitioner prays this Honorable Court to grant its most gracious writ of certiorari, directed to the said United States Circuit Court of Appeals for the Fifth Circuit, to the end that the errors in the record and proceedings in said cause may be brought up and reviewed by this Court and thereupon revise and corrected; in support whereof your Petitioner respectfully makes the following statement of the matter involved:

On February 8, A. D., 1927, your Petitioner, who had been previously convicted on twelve counts of an indictment by which he was charged with having used the United States mails in executing a scheme to defraud, in violation of Section 215 of the Criminal Code, and who, on said date, was confined in the United States Penitentiary at Leavenworth, Kansas, serving a sentence of fourteen years and nine months imposed upon him by the District Court of the United States for the Northern District of Texas, Fort Worth Division, in Cause No. 2273, made application to the said District Court in said case for an order placing him upon probation for a period of five years, under the terms of the Act of March 4, 1925, commonly known as the Probation Act. (43 Stat. 1259). Your Petitioner having been convicted and sentenced, as aforesaid, on the 21st day of November, 1923, in said cause, appealed by Writ of Error to the United States Circuit Court of Appeals for the Fifth Circuit, where said judgment of conviction was, in February, 1925, affirmed, and thereafter, without attempting to have said judgment reviewed by this Honorable Court, about the first of April entered the

said United States Penitentiary to commence the service of said sentence.

The term of court at which Petitioner was convicted and sentenced, had expired long prior to the passage of the Probation Act, and your Petitioner was in the Penitentiary at the time of filing his application for probation in the Court of Original Jurisdiction.

A hearing was had in the District Court upon the application of Petitioner and an answer thereto by the Government, in which it claimed that the application was without merit for that Petitioner had not been punished sufficiently for the offenses of which he was convicted and sentenced, and that the Probation Act did not authorize the District Court (being the Court of Original Jurisdiction) to place your Petitioner upon probation for two reasons: (1), because it did not change or alter the rule of law in force and effect at the time of the passage of said Act, that the Court loses all control of the judgment and sentence at the expiration of the term at which the same was entered, and, (2), that at all events the Act did not alter or change the then existing rule of law that upon the commencement of the service of the sentence, the Court loses all control of the judgment and sentence and was therefore powerless to place Pteitioner upon probation, as sought by him in his application. The Government further made the point that the Probation Act was unconstitutional, but this raises no serious question as we view it.

Upon said hearing, the Court being satisfied that the ends of justice and the best interest of the public, as

well as your Petitioner, would be subserved by the granting of said application, granted the same and entered its order and decree suspending the further execution of the sentence imposed upon Petitioner, placing him upon probation for a period of five years, with W. Erskine Williams, who was designated as special probation officer, and ordering the warden of the United States Penitentiary, at Leavenworth, Kansas, and all officers and agents in charge of said institution to forthwith release and discharge Petitioner from custody.

From said judgment the Government prosecuted a Writ of Error to the United States Circuit Court of Appeals for the Fifth Circuit, which Court, on the 14th day of June, A. D., 1927, entered its judgment reversing the said judgment of the District Court, and rendering judgment in favor of the Governmnet, the basis of said reversal being that the District Court was without authority to enter said order, (1), because the term of Court at which Petitioner was convicted and sentenced had expired prior to the time probation was sought and granted, and (2), at the time of filing his application for probation he was confined in the United States Penitentiary serving his sentence.

Question To Be Determined

The question to be determined is whether or not the Probation Act passed by the Congress of the United States, March 4, 1925, authorized and empowers the Court of Original Jurisdiction to place upon probation a person convicted and sentenced at a term of Court which expired prior to the passage of the Act and of

course, prior to the time of seeking and obtaining probation, and who is serving a sentence in the penitentiary.

JURISDICTION

This Court has power to review said decision of the Circuit Court of Appeals on certiorari under Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

REASONS FOR THE ALLOWANCE OF THE WRIT

It is respectfully submitted that the Court should grant this petition for the following reasons:

(1). Because the Circuit Court of Appeals for the Fifth Circuit in holding in this case that the Probation Act passed March 4, 1925, does not empower the Court of Original Jurisdiction to place upon probation a person convicted and sentenced at a term of Court which has expired, and who is serving a sentence in the penitentiary, rendered a decision in conflict with the decisions of three other United States Circuit Courts of Appeal, to-wit:

> The Ninth Circuit in the case of Nix vs. James, 7 Fed. (2nd) 590;
>
> The Seventh Circuit in the case of Kriebel vs. United States, 10 Fed. (2nd) 762;
>
> The Sixth Circuit in the case of Evans vs. the United States, 12 Fed. (2nd) 64.

In each of said cases said Circuit Court held that the Probation Act empowers the Court of Original Jurisdic-

tion to place upon probation a person convicted and sentenced at a term of Court which not only had long since expired, but had expired prior to the passage of the Act.

(2). Because the Circuit Court of Appeals for the Eighth Circuit entertains doubt on the subject, and in the case of United States vs. Glen Murray, No. 7736, on the docket of said Court, it has certified to this Honorable Court the following question:

> "Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, 43 Stat. L. Chap. 521, Page 1259, to make, during the term at which sentence was imposed, the order placing defendant in error upon probation after he had commenced to serve the sentence?"

(3). Because the question is of great importance to the administration of the Criminal laws of the United States, has never been passed upon by this Honorable Court and should be settled, to the end that there may be uniformity of decision not only in the Circuit Courts of Appeal, but in the District Courts, there being conflict of decision in the District Courts as well, in that the United States District Court of Arizona, in the case of United States vs. Chafina, 14 Fed. (2nd) 622, and the United States District Court for the Southern District of California, in the case of United States vs. Nix, 8 Fed. (2nd) 759, held that the Probation Act has the effect of continuing control in the Court of judgment until the judgment is satisfied, and empowers the Court of Original Jurisdiction to place upon probation a per-

son who is serving his sentence in the penitentiary, while the following District Courts have held to the contrary:

United States District Court for the District of Kansas, in the case of Mouse vs. United States, 14 Fed. (2nd), 202;

United States District Court for the Western District of Arkansas, in the case of Davis vs. United States, 15 Fed. (2nd), 697;

United States District Court for the Northern District of Georgia, in the case of Archer vs. Snook, 10 Fed. (2nd), 567.

Respectfully submitted,

CALLAWAY & WADE.
Attorneys for Petitioner,
Frederick A. Cook.

CERTIFICATE OF COUNSEL

WE HEREBY CERTIFY that we have carefully examined the record, and in the light of its contents consider the petition for a Writ of Certiorari well founded, and that it is not interposed for the purpose of delay.

HERBERT C. WADE,
SAM J. CALLAWAY,
Attorneys for Petitioner.

The attorney for Respondent, United States of America, is the Hon. Henry Zweifel, United States District Attorney for the Northern District of Texas, at Fort Worth, Texas.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926

No.

FREDERICK A. COOK, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT

Reported Below 19 Fed. (2nd), 826, (C. C. A.)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GROUNDS OF JURISDICTION

This is a proceeding by which Petitioner, Frederick A. Cook, sought an order of the Court of Original Jurisdiction placing him upon probation for a period of five years and suspending the further execution of a sentence which, at the time of making his application he was serving in the United States Penitentiary, under the terms of the Probation Act passed by the Congress of the United States on March 4, 1925. (Com. S. Sec.

105644-5-105644-5c). The term of Court at which he was sentenced had expired. The District Court entered its order placing Petitioner upon probation for a period of five years, suspending the further execution of the sentence and directing that the officers in charge of the penitentiary forthwith release and discharge him. (R. 7, 8). On review by Writ of Error the United States Circuit Court of Appeals for the Fifth Circuit entered its final judgment reversing the judgment of the District Court and rendered judgment dismissing Petitioner's application for probation on the 14th day of June, A. D. 1927. (R. 55).

The grounds of the reversal and rendition by the Circuit Court of Appeals were that the Probation Act of March 4, 1925, did not empower the Court of Original Jurisdiction to place upon probation a person convicted at a term of Court which had expired, and who was serving a sentence in the penitentiary. The claim of Petitioner is that said act empowered the Court of Original Jurisdiction to place such person upon probation, notwithstanding the fact that the term of Court had expired and he was serving his sentence in the penitentiary.

The claim asserted is a substantial one, and the Supreme Court of United States has power to review on certiorari said decision of the Circuit Court of Appeals under Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

The holding of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in direct conflict with the holdings of three other Circuit Courts of Ap-

peal, to-wit:

> The Ninth Circuit in the case of Nix vs. James, 7 Fed. (2nd) 590;
>
> The Seventh Circuit in the case of Kriebel vs. United States, 10 Fed.)2nd) 762;
>
> The Sixth Circuit in the case of Evans vs. United States, 12 Fed. (2nd) 64.

In addition to this, there is pending in the Supreme Court of the United States a certified question from the Circuit Court of Appeals for the Eighth Circuit, in the case of United States vs. Glen Murray, No. 7736, on the docket of said Circuit Court, which question is as follows:

> "Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, 43 Stat. L. Chap. 521, Page 1259, to make, during the term at which sentence was imposed, the order placing defendant in error upon probation after he had commenced to serve the sentence?"

There is no uniformity of decision on this question in the United States District Courts for that the District Court for the District of Arizona, in the case of United States vs. Chafina, 14 Fed. (2nd) 622, and the District Court for the Southern District of California, in the case of United States vs. Nix, 8 Fed. (2nd), 759, held that the Act empowers the Court of Original JJurisdiction to grant probation even where the term of Court had expired, and the service of sentence had commenced, while the District Court for the District of Kansas, in

the case of Mouse vs. United States, 14 Fed. (2nd) 202, and the District Court for the Western District of Arkansas, in the case of Davis vs. United States, 15 Fed. (2nd), 697, and the District Court for the Northern District of Georgia, in the case of Archeer vs. Snook, 10 Fed. (2nd), 567, held to the contrary.

STATEMENT OF THE CASE

On February 8, 1927, Petitioner, Frederick A. Cook, who had previously and on November 21, 1923, been convicted in the United States District Court for the Northern District of Texas, on twelve counts of an indictment charging violation of Sec. 215 of the Criminal Code, and sentenced to serve a total of fourteen years and nine months in the United States Penitentiary at Leavenworth, Kansas, and to pay a fine of One Thousand Dollars ($1,000.00), on each of the twelve counts, and who entered the said penitentiary in April of 1925 and was then serving said sentence, filed his application in said District Court, for probation under the terms of the Probation Act passed by Congress on the 4th day of March, 1925. (R 1-4).

A hearing was had on said application and the answer thereto filed by the Government (R. 4-7) at the close of which the Court being satisfied that the ends of justice and the best interest of the public, as well as of the Petitioner, would be subserved thereby, on the 17th day of March, A. D., 1927, granted said application, placed Petitioner upon probation for five years, suspended the further execution of the sentence imposed and ordered that the warden and other officers in charge

of the penitentiary forthwith release and discharge Petitioner. (R. 7, 8).

On appeal by Writ of Error to the Circuit Court of Appeals for the Fifth Circuit said order of the District Court placing Petitioner upon probation, as aforesaid, was, on the 14th day of June, A. D., 1927, reversed and judgment rendered denying Petitioner's application for probation. (R. 55).

The grounds of said reversal and rendition were that the Probation Act did not empower the Court of Original Jurisdiction to place upon probation a person convicted at a term of Court which expired prior to the time of making his application for probation and in fact prior to the passage of the Probation Act and who, at the time of applying for probation, was serving his sentence in the United Stataes Penitentiary. The question to be determined is whether or not the Probation Act did empower the District Court to make the order placing Petitioner upon probation aforesaid.

Specification of Error

It was error for the Circuit Court of Appeals to hold that the Probation Act passed March 4, 1925, did not have the effect of continuing control in the Court rendering judgment until the judgment is satisfied, and that it did not empower the Court of Original Jurisdiction to place upon probation one convicted and sentenced at a term of Court which expired prior to making application for probation and prior to the passage of the Probation Act, and who, at the time of applying for proba-

tion and at the time the order was entered granting probation, was serving a sentence in the United States Penitentiary.

Argument

The provisions of the Probation Act passed March 4, 1925, insofar as they are pertinent are as follows: (Compiled Statutes 105644-5-105644-5c).

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the Court that the ends of justice and the best interest of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the Court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The Court may revoke or modify any condition of probation, or may change the period of probation: Provided, that the period of probation, together with any extension thereof, shall not exceed five years.

"While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

"Sec. 2. That when directed by the court the probation officer shall report to the Court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him or may extend the probation, as shall seem advisable.

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the Court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the Court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

It will be readily seen, on the face of the Act, under any construction, that it grants broad powers to the District Courts, and that it changes the rule of law laid down in the case of Ex Parte, United States, 242 U. S., 27, which in substance is that the District Courts had no power at that time to suspend the imposition or execution of sentence after conviction. This much will be conceded, and in deed, there is no authority whatsoever to the contrary, with the limitations only that the conviction take place after the passage of the Probation Act and probation be sought and granted before the expiration of the term of Court at which the judgment is entered and the service of the sentence has not commenced. It is our contention, however, that the Act is much broader and empowers the Courts of Original Jurisdiction to place upon probation persons convicted at terms of Court which expired long prior to the passage of the Act, and who, at the time of seeking and obtaining probation, have entered upon the service of their sentences; that the Probation Act, being a remedial statute, has the effect of continuing control in the Court of the judgment until the judgment has been satisfied, which in a criminal case where a sentence of imprisonment has been imposed, means until the sentence has been ocmpletely served.

IN SIMILAR CASE CERTIFIED QUESTION FROM EIGHTH CIRCUIT IS NOW BEFORE THE COURT.

Since the passage of the Probation Act there have been a number of cases construing the same. No case involving the question here presented has yet been de-

cided by the Honorable Supreme Court of United States, although at the present time there is pending therein a certified question by the Circuit Court of Appeals for the Eighth Circuit in the case of United States vs. Glen Murray, No. 7736, on the docket of said Circuit Court, which involves substantially the question to be determined here. In said case in the United States District Court for Nebraska, Murray pleaded guilty to violation of the National Prohibition Act, and on October 25, 1926, he was sentenced to a term of three months' imprisonment in the County Jail, and on the same day he was delivered by the marshall to jail keeper, and on that date commennced serving sentence. On October 26, 1'26, the following day, but during the same term of Court, the Court entered an order placing Murray on probation, and thereupon he was released from imprisonment to a special probation officer designated by the Court. The question certified by the said Circuit Court is as follows:

> "Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, 43 Stat. L. Cap. 521, Page 1259, to make, during the term at which sentence was imposed, the order placing defendant in error upon probation after he had commenced to serve the sentence?"

It will be observed that there is in said case involved only the question of whether or not the Probation Act had the effect of abrogating the well established rule that the Court can not in any manner interfere with the execution of the judgment and sentence after the

service thereof has been commenced, and that the question of the expiration of the term is not involved.

ADJUDICATED CASES IN WHICH THE HOLDINGS ARE IN CONFLICT WITH THE HOLDING OF THE COURT IN THE INSTANT CASE

The first case dealing with this question, so far as our search of the reports reveals, is the case of Nix vs. James, District Judge, 7 Fed. (2d), 590. Nix, who had been convicted and sentenced at a term of Court which had expired long prior to the passage of the Probation Act, made application to the Circuit Court of Appeals for the Ninth Circuit for a Writ of Mandamus, to compel the District Judge presiding over the Court in which Nix was convicted to hear and consider his application for probation. It appears that after conviction, Nix prosecuted and appealed by Writ or Error to said Circuit Court where the judgment of conviction was in all things affirmed, and that prior to entering the penitentiary to commence the service of his sentetnce, the Probation Act had been passed and thereupon he filed in the Court of Original Jurisdiction his application for probation. The District Court being of the opinion that it was without power to hear and consider the application, dismissed it and thereupon the Writ of Mandamum was applied for in the Circuit Court of Appeals. The Circuit Court granted the writ, and in an elaborate and well-reasoned opinion, pointed out that the Act in question was remedial in its nature, and since its terms are "shall have the power, after conviction or after a plea of guilty or nolo contendere for any

crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and place the defendant upon probation," and did not by its terms place any limit upon the time within which the power should be exercised, that it applied to cases of conviction before the passage of the Act, even though the term of Court had long since expired, and stated in substance that to hold otherwise would be reading into the Act a limitation on the power granted not written there by Congress. In the course of its opinion the Court made the following pertinent statements:

> "These provisions of the statute clearly authorize the district court to modify from time to time the sentence imposed on a defendant, even after the expiration of the term at which sentence is pronounced." And "The new power vested in the district courts is available to them 'after conviction or after plea of guilty or nolo contendere.' The statute does not say how soon after conviction or plea the power must be exercised. In view of the liberal construction to which the statute is entitled we cannot read into it a limitation on the power granted not written there by Congress."

After the Circuit Court in the Nix case had granted the mandamus, Nix applied to the District Court for probation and while refusing the same upon its merits, the District Court in its opinion in 8 Fed. (2d), 759, observed as follows:

> "It is my understanding that the opinion of

> the Circuit Court of Appeals, filed in this matter August 3, 1925, has the effect of continuing control in the court of the judgment until the judgment is satisfied. Accordingly, I shall deny the application for probation at this time, without prejudice to its renewal one year from the date upon which defendant shall enter upon the sentence imposed."

The case of Kriebel vs. United States, 10 Fed. (2d), 762, decided by the Circuit Court of Appeals for the Seventh Circuit, is one in which the facts, so far as they are pertinent here, are identical with those in the Nix case. Conviction was for the violation of Sec. 215 and Sec. 37 of the Criminal Code, a pententiary sentence and fine was imposed at a term of court which expired prior to the passage of the Probation Act, and after prosecuting an appeal by writ of error, (the Probation Act in the mean-time having been passed) Kriebel, before entering upon the service of his sentence, applied for probation, which was denied by the District Court upon the ground that it had no power to grant the same since the term of Court had long since expired. The Circuit Court, however, reversed the judgment and expressly approved the holding of the Circuit Court for the Ninth Circuit in the Nix case, with this distinction, however, that it was of the opinion that to grant probation would not change or modify the judgment or sentence, but merely suspend the execution thereof in the manner designated in the judgment, leaving the judgment and sentence, however, unchanged. In the course of its opinion the Court said:

> "We are concerned here with a grant of power. The statute fixes a time when the exercise of it may begin, providing that it may be done 'after conviction or after a plea of guilty or nolo contendere,' but there is no limitation in the statute that it shall not be exercised after some other event."

The case of Evans vs. District Judge, 12 Fed. (2d), 64, decided by the Corcuit Court of Appeals for the Sixth Circuit, is one in which the holdings in the Nix and Kriebel cases were expressly approved. Here, then, are three United States Circuit Courts of Appeal that have held that the Probation Act empowers the Courts of original jurisdiction to place upon probation persons convicted at terms of Court which expired long prior to the passage of the Act. The only distinction in these cases and the one at bar is that the applicants for probation had not, at the time they were granted probation, actually entered the penitentiary to commence service of their respective sentences. The holdings, however, are in direct conflict with the holding of the Circuit Court for the Fifth Circuit in the instant case.

The case of United States vs. Chafina, 14 Fed. (2d), 622, a District Court case, decided by Judge Jacobs of the District of Arizona, is directly in point, and we submit that the reasoning in the opinion is sound. Judge Jacobs said:

> "To hold otherwise would be as is said in the case of Nix vs. James, 7th Fed. 590, reading into the Act a limitation on the power granted, not

written there by Congress. I am of the opinion that the Act clearly vests power in the trial court to admit a defendant upon probation at any time after conviction, either before or after service of the sentence has commenced, and before the full term of the sentence has been served."

Cases Holding Contrary to Our Contention

There are at least three reported cases decided by District Courts which have held that the Probation Act does not grant the Court of Original Jurisdiction the power to place upon probation one who has commenced the service of a sentence of imprisonment:

Archer vs. Snook, 10 Fed. (2d) 567;

Davis vs. United States, 15 Fed. (2d 697;

Mouse vs. United States, 14 Fed. (2d) 202.

In the Archer vs. Snook case, 10 Fed. (2d) 567, Judge Sibley of the Northern District of Georgia, seems to place his holding that the Probation Act does not apply to a case where the applicant is serving his sentence in the penitentiary, primarily, if not entirely, upon the ground that the penitentiaries are usually situated a great distance from most of the Judges, and that it would involve much complication to place persons on probation after they have entered the penal institutions. We submit that there is no merit in this contention, and that a complete answer thereto is that it is no greater hardship to return a person from the penitentiary than

it is to place him there. The officers in charge of the United States Penitentiaries are agents of the executive department of the Government, a co-ordinate department, and it is upon the authority of the judgment and commitment of a Court that they receive and hold prisoners. As has been well stated, we are concerned here with a grant of power, and if Congress has seen fit to grant the power to the Courts of Original Jurisdiction, we submit that the distance of the penitentiary from the Judges furnishes no basis for concluding that the Act was not intended to apply to cases where the applicants are already in the penitentiary.

In the case of Davis vs. United States, 15 Fed. (2d) 697, Judge Youmans of the Western District of Arkansas, placed his holding that the Probation Act did not empower the Courts of Original Jurisdiction to place upon probation a person serving a sentence in the penitentiary upon two grounds, (1), that the term at which the applicant was sentenced had expired, and (2), that the Act in no way was applied after service of the sentence had commenced, holding that the act did not change or alter the pre-existing rules of law, with respect to losing control of the judgment at the expiration of the term and likewise at the commencement of the service of the sentence.

Judge Pollock, District Judge for the District of Kansas, in the case of Mouse vs. United States, 14 Fed. (2d) 202, took the position that while the Act applies notwithstanding the expiration of the term at which the sentence was imposed, yet it did not apply if service of

the sentence in a penitentiary had commenced, upon the ground that the Courts should not be permitted to invade the penal institutions of the country during the term of imprisonment and "after all jurisdiction over the subject matter and the person of the offender has been lost." We submit that there is no occasion for sounding a note of alarm if the Probation Act is to be construed so as to empower the District Courts to place upon probation persons serving sentences in the penitentiary, for if the District Courts can be entrusted with the discretionary power to impose sentences ranging from a dollar fine to many years in the penitentiary, they surely can be entrusted with the power to grant probation, in their discretion, to persons in prison, when it shall be made to appear to the satisfaction of such courts that the best interest of the public, as well as the applicants, will be subserved thereby. To say "after all jurisdiction over the subject matter and the person of the offender has been lost" is simply arguing in a circle, for the question to be determined is whether or not Congress, by the Probation Act, has continued control of the subject matter and the execution of the judgment in the Court of Original Jurisdiction until the judgment has been satisfied. If that power has been granted, then all jurisdiction over the subject matter and the person of the offender has not in fact been lost.

Statutory Construction

A cardinal rule of statutory construction is that where the terms of the statute are unambiguous and do not involve an absurdity, it is the duty of the Court to give

effect to the language as written regardless of any supposed notion as to what might have been intended by the law-makers or as to what might afterwards seem advisable that the law-making body should have provided for. This rule is no better illustrated than by the Honorable Supreme Court's interpretation of what is commonly known as the White Slave Traffic Act. In the famous Caminetti case, 61 L. Ed. 442, this Honorable Court held that irrespective of the fact that Congress might have intended the Act to apply only to commercialized vice or traffic in women for gain, and not to mere personal episodes between men and women, which was practically conceded, the act by its plain terms covered both situations, and that the Court could not by construction exclude from the operation thereof, cases of mere personal episodes. This Court Said:

> "It is contended that the Act of Congress is intended to reach only commercialized vice, or the traffic in women for gain, and the conduct of petitioner, however reprehensible in morals, is not within the purview of the statute, when properly construed in the light of its history, and the purposes intended to be accomplished by its enactment. It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making Body that passed it, the sole function of the court is to enforce it according to its terms. Where the language is plain and admits

> of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meaning need no discussion."

In the case of Hamilton vs. Rathbone, 44 L. Ed. 219, the Supreme Court said:

> "But where the Act is clear upon its face, and when standing alone, it is fairly susceptible of but one construction, that construction must be given to it."

In the case of Holy Trinity Church vs. United States, 143 U. S. 457, Justice Brewer, speaking for the Supreme Court, said:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language he has used. . . . No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Applying this rule to the Act in question, we submit that it cannot logically be held that the Act does not apply to those persons confined in the penitentiary. Congress, for a purpose, wrote in the act "after conviction or after plea of guilty or nolo contendere" and "to suspend the imposition or execution of sentence" and the only limitation seems to be that "it shall appear to the satisfaction of the Court that the ends of justice and the best interest of the public, as well as the de-

fendant will be subserved thereby." Under the rules of statutory construction it should not be permissible for us to inquire into the uncertain question of what the individual members of Congress might have intended by the words, for certainly there is no ambiguity in them. Had it meant that the Act should apply only before sentence imposed the words "or execution of sentence" would not have been used, and since there is no limitation written into the statute as to how long after the imposition of sentence the power may be exercised, to place a limitation upon that power and hold that it may not be exercised at any time before the sentence has been satisfied, is to place a limitation thereon not written there by Congress.

Advisability of Construction Contended for

Were it permissible to consider what may have been in the minds of the individual member of Congress, still we see no reason for concluding that Congress should not have intended the statute to apply to those persons already serving their sentences. Certainly Congress was providing a remedy and had in mind that the existing laws were wholly inadequate in that the parole law which had long been in force and effect, the law allowing a certain time for good behavior (Comp. S. 10532) and the pardoning power vested in the President were wholly inadequate, otherwise it would not have thought that there was any necessity for providing a new remedy. The pardoning power in scope was broad enough to cover the case of every person convicted, but as a practical matter it was inadequate, and therefore the parole

law was passed. This law provided a remedy for only those persons who were in the penitentiaries and had served a third of their term of imprisonment (Comp. S. 10535). It did not cover the cases of persons sentenced to serve terms of imprisonment in jail. As the law had wisely surrounded the person charged with the commission of an offense with every safeguard to prevent his unjust conviction, undoubttedly Congress deemed it expedient and proper to surround those already convicted, or that might be convicted, with every safeguard against unjust punishment after conviction. The Government's position on the advisability of the construction of this statute, for which we contend, seems to be substantially the same as that expressed by Judge Pollock, to-wit: That to give such an interpretation to the probation statute would permit the courts to invade the penal institutions of the country and take therefrom persons serving their sentences. But why should this be alarming or be considered unwise? Surely the District Judges who have exercised the discretionary power of imposing sentences that might range from a one-dollar fine to many years in the penitentiary can be entrusted to administer the probation law fairly and to the best interest of society. In most instances they are far more familiar with the actual facts than any other person or body entrusted with the granting of any character of clemency. Usually they are in a far better position to discover the existence of facts and circumstances which point conclusively to the fact that the best interest of society and the convict will be best subserved by leniency being granted. So that from the standpoint of what might

now seem wise for Congress to have provided for, we submit that there is no logical reason why one should conclude that Congress did not intend the Act to apply to those persons serving their sentences.

It may be suggested by the Government that from the fact that the Committee Report on the bill in question shows that it was not intended to pass anything radical, that the Act should not be applied except to those cases that would arise in the future, or at least before the term of court at which the prisoner had been sentenced had expired, and in no event to those persons confined in the penitentiary, since this would abrogate the long existing law that after the term of court has expired the court loses control of the judgment, and likewise the long existing law that in the absence of statutory authority the court loses control when the person enters upon the service of the sentence. Of course a change was brought about by the passage of the Probation Act, but we do not think that any radical change can be held to have been effected thereby, even though the control of the judgment is vested in the trial court, until it has been fully satisfied. It is conceded by the Government, and as a matter of fact was decided in the case of Ex Parte United States 242 U. S. 27, that as the law then existed the court did not have the power to suspend the imposition of sentence after conviction. Certainly so far as suspending the imposition of sentence is concerned a very emphatic change in the law has been brought about by the passage of the Probation Act. The old law was overturned, and a new condition of affairs in this respect brought about. Certainly if the change

for which we contend might be considered radical, so should the change admittedly effected be considered radical.

Looking to Committee Reports and Congressional Debates for Aid in Interpreting the Act.

Assuming it to be proper to look to committee reports and congressional debates preceding the passage of the Probation Act, which we think is very doubtful, as the language of the Act seems to be plain, we submit that because these show an intention to pass a Probation Act in line with acts passed by the various states of the Union, is no ground for concluding that the Act in question was not intended to apply to those persons already serving their sentences in the penitentiary, for at least two of the State Statutes then in existence have been held to apply to persons serving their sentences:

Antonio vs. Milliken, 9 Ohio App. 356 (1918);
State vs. Teal, 108 S. C. 455; 95 S. E. 69 (1917).

It does not appear from the congressional record that in passing the Act in question Congress was attempting to pattern after any particular Probation Act, and since the State Statutes on this subject are by no means uniform, and under the language of some the Courts have held that persons already incarcerated are the beneficiaries thereof, and under the language of others they have held otherwise, the statute in question must be interpreted in accordance with its plain language.

Constitutionality of the Probation Act

As to the constitutionality of the Probation Act, we

do not think there is much ground for the entertainment of any serious doubt on this subject. To begin with, a Probation Act of this general character had the advance approval of the Supreme Court of the United States, 242 U. S., 27, in which the Court in substance recommended that such an act be passed to the end that the district courts might be in a position to deal more justly with those persons convicted of crime. In the second place, the act was specifically passed upon and upheld by the Circuit Court of Appeals for the Ninth Circuit in the case of Nix vs. James, 7 Fed. (2nd) 590, and the conclusion of the Court on this question in that case has been impliedly, if not expressly, approved by the decision of each of the courts that have passed on the Probation Act in any form. At all events no case has held or even indicated that the statute might for any reason be unconstitutional. Substantially the only ground advanced is that it might be an encroachment on the pardoning power of the President under the Constitution. The Parole Act passed June 25, 1910, was not considered as violative of the Constitution, or an encroachment on the pardoning power, and this statute has been expressly passed upon in the following cases:

Anderson vs. Carroll, 263 U. S., 192; 68 L. Ed. 247;

O'Brien vs. McClaughry, 209 Fed., 819;

Thompson vs. Duehay (D. C.) 217 Fed. 484, affirmed (C. C. A.) 223 Fed. 305.

While the pardoning power granted to the President is exclusive, the granting of parole under the Parole Act

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 539

FREDERICK A. COOK, *Petitioner*,

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF PETITIONER

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OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals will be found in 19 Fed. (2nd), 826. The District Court rendered an opinion which is not reported, but which is found in the record, pp. 17-50.

GROUNDS OF JURISDICTION

The judgment of the Court below, reversing and rendering the judgment of the District Court, was rendered June 14, 1927. (R. 55, 56). On September 12, 1927, petitioner applied to this Court for a writ of certiorari, under Sec. 240-A, Judicial Code, as amended by the Act of February 13, 1925, (C. 229, 43 Stat., 936-938). The writ was granted October 31, 1927.

QUESTION PRESENTED

The question presented is whether the Probation Act passed by the Congress of the United States on March 4, 1925, (Comp. S. Sec. 105644-5-105644-5C, 43 Stat L., Chap. 521, Page 1259), authorized the Court of original jurisdiction to place upon probation a person convicted at a term of court which expired prior to the passage of said Act, and who, at the time of applying for and obtaining probation, was serving a sentence in the penitentiary.

STATEMENT

On February 8, 1927, Petitioner, Frederick A. Cook, who had previously and on November 21, 1923, been convicted in the United States District Court for the Northern District of Texas, on 12 counts of an indictment for violation of Sec. 215 of the Criminal Code, and sentenced to serve a total of fourteen years and nine months in the United States Penitentiary at Leavenworth, Kansas, and to pay a fine of one thousand dollars ($1,000) on each of the twelve counts, and who en-

tered the said penitentiary in April of 1925, and was then serving said sentence, filed his application in the District Court, for probation under the terms of the Probation Act passed by Congress on the 4th day of March, 1925. (R. 1-4).

A hearing was had on said application and the answer thereto filed by the Government (R. 4-7), at the close of which the Court being satisfied that the ends of justice and the best interests of the public, as well as the petitioner, would be subserved thereby, on the 17th day of March, A. D. 1927, granted said application, placed Petitioner upon probation for five years, suspended the execution of the sentence imposed and ordered that the warden and other officers in charge of the Penitentiary forthwith release and discharge Petitioner. (R. 7, 8). On appeal by writ of error to the Circuit Court of Appeals for the Fifth Circuit, said order of the District Court placing Petitioner upon probation, as aforesaid, was, on the 14th day of June, A. D. 1927, reversed, and judgment rendered denying Petitioner's application for probation. (R. 55, 56).

SPECIFICATION OF ERROR

It was error for the Circuit Court of Appeals to hold that the Probation Act passed by Congress March 4, 1925, did not have the effect of continuing control in the Court rendering the judgment until the judgment is satisfied, and that it did not empower the Court of original jurisdiction to place Petitioner upon probation

even though he was convicted at a term of Court which expired prior to the passage of the Act and who, at the time of applying for probation and obtaining an order granting the same, was serving his sentence in the United States Penitentiary.

SUMMARY OF ARGUMENT

1. Opening statement.
2. Adjudicated cases dealing with Federal Probation Law.
    a. Holding in the instant case.
    b. Decisions of other Federal Courts regarding probation.
3. State court decisions regarding probation laws.
4. Statutory construction.
5. Advisability of construction contended for from standpoint of supposed beneficiaries thereunder.
6. Advisability of construction contended for from standpoint of whether District Courts should be entrusted with the power.
7. Looking to Committee Reports and Congressional Debates for aid in interpreting the Act.
8. Constitutionality of Probation Act.
9. Conclusion.

ARGUMENT

The provisions of the Probation Act passed March 4, 1925, in so far as we deem them pertinent to the question here involved, are as follows (43 Stat. L., Chap. 521, Page 1259):

"Sec. 1. That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have the power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation; PROVIDED, That the period of probation, together with any extension thereof, shall not exceed five years.

"While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

"Sec. 2. That when directed by the court, the

probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall deem advisiable.

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

Petitioner contends that the said provisions of the Probation Act are plain and unambiguous and that they empower the courts of original jurisdiction to place upon probation a person convicted at a term of court which has expired and who is serving his sentence in the penitentiary, the only condition being that it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby; that the statute provides that this may be done "after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment," and that the statute contains no limitation as to the time after conviction, plea of guilty, or nolo contendere, within

which the power must be exercised, except that it shall appear to the satisfaction of the court that the ends of justice, etc., will be subserved thereby. The statute is obviously a remedial one, and therefore should, if necessary, be given a fairly liberal construction.

Petitioner further contends that to hold that the Act does not empower the court of original jurisdiction to grant probation after the term of court at which the sentence was pronounced, has passed, or after the defendant has entered upon the service of his sentence, either in a common jail or the penitentiary, would be reading into the statute, by judicial construction, a limitation not written there by the law-making body, and that this, under the rules of law, should not be done. The Government may, and probably will contend, that the words, "to suspend the imposition or execution of sentence and to place the defendant upon probation" mean that the suspension of the execution of sentence must be the entire sentence and that the statute not containing the words "suspend the further execution of the sentence" the Probation Act does not grant the power to place upon probation one who has commenced the service of his sentence. One is imprisoned from the moment of incarceration to the end of confinement, and the expression "to suspend the execution" fits a person already serving a sentence just as well as one who has not commenced the service of the sentence, although it has been pronounced. As we will later point out, there are other reasons why the statute should be held to apply to those already serving their sentences, since to

hold otherwise would narrow the scope of the statute to a point where its usefulness would practically be destroyed.

ADJUDICATED CASE DEALING WITH FEDERAL PROBATION LAW

A. Holding in the Instant Case

In the insant case the Circuit Court of Appeals for the Fifth Circuit placed its holding that the Act does not empower the court of original jurisdiction to place Petitioner upon probation, upon two grounds: (1) That the term of court at which Petitioner was convicted and sentenced had expired, and (2) that Petitioner was serving his sentence in the Penitentiary at the time of applying for and obtaining probation. In this connection it said (R. 53, 54):

> "Nothing in the Probation Act indicates an intention to change the law as to the effect of the expiration of a term of court on the court's control or jurisdiction of a case in which a final judgment was rendered during that term," and "Nothing in the language of the Probation Act indicates an intention to change or add to the existing laws on the subject of releasing, before the expiration of the time for which they were sentenced, persons confined in execution of judgments of conviction of offenses against the laws of the United States."

Whether the Government contends that the Act does not cover a situation where the term of court has expired but the defendant has not entered upon the service

of the sentence, we can not say, as there are several decisions by Circuit Courts of Appeal holding directly to the contrary, and the Government's brief, in resistance of the granting of the application for certiorari in this case, would indicate, to say the least, that it relies on the proposition that the statute at all events does not empower the court to place upon probation one who has entered upon the service of his sentence. It would seem that if the statute applies after the term of court has expired, there is no logical reason why it should not apply even though the applicant is serving his sentence. In other words, the position of the Circuit Court of Appeals in the instant case is infinitely more logical than the position that the Act applies even though the term has expired, but not to a situation where the applicant is in the penitentiary. If the statute has the effect of overriding the well established rule of law then existing that the Court loses all control of the judgment at the expiration of the term, then we submit there is utterly no reason why it should not be held to have modified the equally well established and then existing rule of law that the Court loses control of the sentence in a criminal case when the defendant enters upon the service thereof.

B. Decisions of Other Federal Courts Regarding Probation

The first case dealing with this question, so far as our search of the reports reveals, is the case of *Nix* v. *James*, District Judge, 7 Fed (2nd), 590. Nix, who had been convicted and sentenced at a term of court which had expired long prior to the passage of the Probation Act, made application to the Circuit Court of Appeals for

the Ninth Circuit, for a writ of mandamus to compel the District Judge presiding over the court in which Nix was convicted, to hear and consider his application for probation. It appears that after conviction, Nix prosecuted an appeal by writ of error to said Circuit Court, where the judgment of conviction was in all things affirmed, and that prior to entering the penitentiary to commence the service of his sentence, the Probation Act had been passed, and thereupon he filed in the Court of original jurisdiction his application for probation. The District Court being of the opinion that it was without power to hear and consider the application, dismissed it, and thereupon the writ of mandamus was applied for, as above stated. The Court granted the writ, and in an elaborate and well reasoned opinion pointed out that the Act in question was remedial in its nature, and since its terms are, "shall have the power after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment" to suspend the imposition or execution of sentence and place the defendant upon probation, and did not by its terms place any limitation upon the time within which the power should be exercised, that it applied to cases of conviction before the passage of the Act, even though the term of Court at which the conviction and sentence took place had long since expired, stating in its opinion that to hold otherwise would be reading into the Act a limitation on the power granted not written there by Congress. It will be observed, then, that the holding of said Court is in direct conflict with the holding of

the Circuit Court for the Fifth Circuit in the instant case. In the course of its opinion, the Court said:

> "The statute plainly contemplates that in cases falling within its purview the District Court shall retain control of the punishment to be meted out after sentence is pronouced and after the expiration of the term." And
>
> "These provisions of the statute clearly authorize the District Court to modify from time to time the sentence imposed on a defendant, even after the expiration of the term at which sentence is pronounced." And
>
> "The new power vested in the District Courts is available to them 'after conviction or after a plea of guilty or nolo contendere.' The statute does not say how soon after conviction or plea the power must be exercised. In view of the liberal construction to which the statute is entitled we cannot read into it a limitation on the power granted not written there by Congress."

The Court, after citing among other authorities, 2 Lewis' Sutherland on Statutory Construction (2d Ed.) S. 583, *Lovejoy* v. *Isbell*, 70 Conn., 557, on the proposition that a remedial statute should be construed liberally, discucced the case of *Sommers* v. *Johnson*, 4 Vt. 278, 24 Am. Dec. 604. This case involves the construction of a statute for the relief of imprisoned debtors which provides a method for one imprisoned for debt obtaining his release. The pertinent part of the statute is "whenever any person is imprisoned," etc. The contention was made that by reason of said words the statute

granted relief only to those who should be committed to prison after the passage of the Act and not to those already incarcerated. In that case the Court held that the statute was remedial in its nature, entitled to a liberal construction, and said:

> "Any man is imprisoned each moment from the time of his commitment to the time of his dicharge; and there is no reason to believe that the Legislature intended to provide relief for those, who should afterwards be committed to prison, and leave in perpetual imprisonment those whose hard bondage alone dictated the necessity for the statute."

The Court, in the Nix case, in the course of its opinion, on Page 594, stated that nothing contained in the opinion should be construed as holding that the Probation Act has any application to a defendant who had entered upon the service of his term of imprisonment. This, as we view it, was clearly a disclaimer of any intention to pass on an issue not before the Court, and from a reading of the opinion it would appear that the Court felt called upon to make such disclaimer by reason of the fact that every reason assigned why the Probation Act applied, notwithstanding the expiration of the term, was just as good a reason why it should apply even though the service of the term of imprisonment had commenced. At all events, the question of whether or not it applied to those already imprisoned was not before the Court, as the applicant, Nix, has not entered upon the service of his sentence.

After the granting of the writ of mandamus in the

aforesaid Nix case, Nix again applied to the Court of original jurisdiction for probation, and while the Court refused his application for probation upon its merits, nevertheless it made the following statement in its opinion (*United States* v. *Nix*, 8 Fed. (2nd), 759):

> "It is my understanding that the opinion of the Circuit Court of Appeals, filed in this matter August 3, 1925, has the effect of continuing control in the court of the judgment until the judgment is satisfied. Accordingly, I shall deny the application for probation at this time, without prejudice to its renewal one year from the date upon which defendant shall enter upon the sentence imposed."

The case of *Kriebel* v. *United States*, 10 Fed. (2nd), 762, decided by the Circuit Court of Appeals for the Seventh Circuit, is one in which the facts, so far as they are pertinent, are identical with those in the Nix case. Conviction was for violation of Sec. 215 and Sec. 37 of the Criminal Code, a penitentiary sentence, and fine was imposed at a term of Court which expired prior to the passage of the Probation Act, and after prosecuting an appeal by writ of error, Kriebel applied for probation before entering upon the service of his sentence. The District Court, like the District Court in the Nix case, was of the opinion that it had no power to grant the application since the term of court had long since expired. The Circuit Court, however, reversed the judgment, expressly approved the holding in the Nix case with this distinction, that it was of the opinion that to grant probation would not change or modify the judgment or sentence, but merely suspend the execution thereof in the

manner designated in the judgment, leaving, however, the judgment and sentence unchanged. In the course of its opinion the Court said:

> "We are concerned here with a grant of power. The statute fixes a time when the exercise of it may begin, providing that it may be done 'after conviction or after a plea of guilty or nolo contendere,' but there is no limitation in the statute that it shall not be exercised after some other event."

As in the Nix case, what the Court here said, "but there is no limitation in the statute that it shall not be exercised after some other event" is just as good a reason why the statute should apply to the case of one already imprisoned as to a defendant convicted at a term of court which had long since expired, but who had not entered upon the service of the sentence.

The case of *Evans* v. *District Judge*, 12 Fed. (2nd), 64, decided by the Circuit Court of Appeals for the Sixth Circuit, is one in which the holdings in the Nix and Kriebel cases were expressly approved. Without detailing the facts, it is sufficient to say that in so far as they are pertinent they were the same as in those cases.

The case of *Ackerson* v. *United States*, 15 Fed. (2nd), 268, is another case on all fours with the Nix and Kriebel cases, and it follows them. This case also stands for the doctrine that the Court, in the absence of a statute to the contrary, lost all control of its judgment at the expiration of the term, and the fact that the case was pending on appeal made no difference, for that when the

mandate was returned affirming the judgment of the Trial Court, no order could be entered inconsistent therewith. The Government seems to be of the opinion that the fact that probation was granted in these cases during the term of court at which the mandate from the Circuit Court of Appeals, respectively, was received, might make some difference. The opinion in said case shows the fallacy of such contention, and such a distinction is obviously unfounded in law, for the law is well settled that where a judgment on appeal has been affirmed, the court can not change or alter it upon receipt of the mandate, even during the term of Court at which the mandate is received.

State Ex Rel Zabel v. *Municipal Court*, 179 Wis., 195; 190 N. W., 121.

The case of *United States* v. *Chafina*, 14 Fed. (2nd), 622, decided by Judge Jacobs of the District of Arizona is directly in point, and we submit that the reasoning in the opinion is sound. Judge Jacobs in granting probation to a person already serving her sentence of imprisonment said:

> "To hold otherwise would be as is said in the case of Nix vs. James, 7th Fed. 590, reading into the Act a limitation on the power granted, not written there by Congress. I am of the opinion that the Act clearly vests power in the Trial Court to admit a defendant upon probation at any time after conviction, either before or after service of the sentence has commenced, and before the full term of the sentence has been served."

The case of *United States* v. *Davis et al.*, 19 Fed. (2nd), 536, decided by the District Court of the Eastern District of Idaho, presumably relied upon by the Government, is one in which application for probation was made after conviction and sentence, but prior to entering upon the service thereof, for a sufficient length of time to permit the defendant to present an application to the President of the United States for executive clemency. The Court stated that it was conceded that the statute authorized the granting of probation prior to the time of entering upon the service of the prison sentence and cited the Nix, Kriebel, Evans and Ackerson cases. It denied the application, however, upon the theory that no proper grounds were presented for the granting of the same since the basis of it was for time to submit an application to the President for a pardon. This case, then, is in direct conflict with the Government's contention regarding the granting of probation after the expiration of the term, and it in no way or manner involves the question of whether or not the statute applies where the person is serving a sentence of imprisonment.

In the case of *Miller* v. *Snook*, 15 Fed. (2nd), 68, decided by Judge Sibley of the Northern District of Georgia, cited by the Government in its brief resisting the granting of the application for certiorari herein, does not involve the question of probation at all, and the Court in its opinion expressly so stated. In that case a penitentiary sentence was imposed, and a commitment issued and placed in the hands of the marshal. Two hours

after the marshal had started on the road to the penitentiary with the defendant, Miller, and during the term of Court at which the sentence had been pronounced, the Court entered an order reducing the term of the sentence. The only question involved in the case was whether or not the warden of the penitentiary was bound to recognize the second order, and commitment thereon, since he had no notice thereof until after the prisoner had been received at the penitentiary by virtue of the original commitment. There is in this case considerable discussion of the division of power between the executive and the judicial branches of the Government, but the effect of the Probation Act is in no way or manner involved or discussed.

The case of *United States* v. *Young et al.*, 17 Fed. (2nd), 129, a District Court case, with opinion by Judge St. Sure of the Northern District of California, relied upon by the Government, is one in which the Court denied the applications for probation of all the defendants in said case upon their merits. As to one defendant, however, who had entered upon the service of a prison sentence, the Court stated in substance that that fact was sufficient ground for denying the application, as the Court was of the opinion that the prevailing view was that the Probation Act did not empower the Court to grant probation after the service of a sentence had commenced, as is disclosed by the opinion. However, the Judge in said case expressly states that he was originally of the same opinion held by Judge James, who dismissed Nix's application for probation upon the

ground that the jurisdiction to hear it did not exist, as the term had expired, resulting in the mandamus proceedings in the Circuit Court for the Ninth Circuit. Judge St. Sure having been compelled by the holding of the Circuit Court in the Nix case to recede from his original position, was not willing to go farther than the holding therein.

There are at least three reported cases decided by District Courts which have held that the Probation Act does not grant the Court of original jurisdiction the power to place upon probation one who has commenced the service of a sentence of imprisonment:

Archer v. *Snook*, 10 Fed. (2nd), 567;
Davis v. *United States*, 15 Fed. (2nd), 697;
Mouse v. *United States*, 14 Fed. (2nd), 202.

In the *Archer* v. *Snook case*, 10 Fed. (2nd), 567, Judge Sibley of the Northern District of Georgia seems to place his holding that the Probation Act does not apply to a case where the applicant is serving his sentence in the penitentiary, primarily, if not entirely, upon the ground that the penitentiaries are usually situated a great distance from most of the Judges, and that it would involve much complication to place persons on probation after they have entered the penal institutions. We submit that there is no merit in this contention, and that a complete answer thereto is that it is no greater hardship to return a person from the penitentiary than it is to place him there. The officers in charge of the United

States Penitentiaries are agents of the executive department of the Government, a co-ordinate department, and it is upon the authority of the judgment and commitment of a Court that they receive and hold prisoners. As has been well stated, we are concerned here with a grant of power, and if Congress has seen fit to grant the power to the courts of original jurisdiction, we submit that the distance of the penitentiary from the Judges furnishes no basis for concluding that the Act was not intended to apply to cases where the applicants are already in the penitentiary.

In the case of *Davis* v. *United States*, 15 Fed. (2nd), 697, Judge Youmans of the Western District of Arkansas, placed his holding that the Probation Act did not empower the courts of original jurisdiction to place upon probation a person serving a sentence in the penitentiary, upon two grounds, (1), that the term at which the applicant was sentenced had expired, and (2), that the Act in no way applied after service of the sentence had commenced, holding that the Act did not change or alter the pre-existing rules of law, with respect to losing control of the judgment at the expiration of the term and likewise at the commencement of the service of the sentence.

Judge Pollack, District Judge for the District of Kansas, in the case of *Mouse* v. *United States*, 14 Fed. (2nd), 202, took the position that while the Act applies notwithstanding the expiration of the term at which the sentence was imposed, yet it did not apply if service of the

sentence in a penitentiary had commenced, upon the ground that the Courts should not be permited to invade the penal institutions of the country during the term of imprisonment and "after all jurisdiction over the subject matter and the person of the offender has been lost." We submit that there is no occasion for sounding a note of alarm if the Probation Act is to be construed so as to empower the District Courts to place upon probation persons serving sentences in the penitentiary, for if the District Courts can be entrusted with the discretionary power to impose sentences ranging from a dollar fine to many years in the penitentiary, they surely can be entrusted with the power to grant probation, in their discretion, to persons in prison, when it shall be made to appear to the satisfaction of such courts that the best interests of the public, as well as the applicants, will be subserved thereby. To say "after all jurisdiction over the subject matter and the person of the offender has been lost" is simply arguing in a circle, for the question to be determined is whether or not Congress, by the Probation Act, has continued control of the subject matter and the execution of the judgment in the Court of original jurisdiction until the judgment has been satisfied. If that power has been granted, then all jurisdiction over the subject matter and the person of the offender has not in fact been lost.

STATE COURT DECISIONS REGARDING PROBATION LAWS

In may be profitable to briefly refer to the holdings of State Courts under the various probation laws.

The case of *State* v. *Teal*, 108 S. C., 455; 95 S. E., 69, by the Supreme Court of South Carolina, is one in which Teal was convicted of seduction and sentenced to three years in the penitentiary, the judgment providing that if the defendant should deposit certain money each year, commencing on a given date, for the support of the child of the prosecuting witness, eighteen months of the sentence should be suspended; that failing to do so, the suspension of the last eighteen months should be revoked, and the defendant required to serve the full three years. The authority for this suspension of the sentence after service of the first eighteen months thereof is found in the Act of February 15, 1912, 27 Stat. L., Page 773, S. C., which so far as it is pertinent, reads as follows:

> "Circuit Judges of this State shall have the power and authority, in their discretion, to suspend sentences imposed by them, upon such terms and upon such conditions as in their judgment may be fit and proper."

The Supreme Court upheld the aforesaid judgment and obviously the language of the statute under which it falls is nothing like as strong in our favor as the language of the Federal Probation Act.

Reference to the opinion of Judge Sibley, in the case of *Archer* v. *Snook*, 10 Fed. (2nd), 567, ante, discloses

that at the time of imposing the sentence the Court was of the opinion that the latter part of the sentence could be suspended and the defendant placed upon probation. This is exactly what was done in the South Carolina case. However, when Archer sought release by habeas corpus, Judge Sibley had changed his mind.

The holding in the case of *Antonio* v. *Milliken*, 9 Ohio App., 356, is substantially the same as that in the *State* v. *Teal case*.

The Government relies upon the case of *State* v. *Ensign*, 38 Idaho, 539; 223 Pac., 230. In that case, after the service of a jail sentence had commenced, the trial court entered an order annulling the jail sentence and remitting the fine. On appeal it was held that there was utterly no authority for such procedure and that the probation statute of Idaho (C. S. 9041) required that any character of probation under the statute had to be granted at the time of rendering the judgment and become a part thereof. The Court said:

> "The provisions of C. S. 9041, relating to parole and suspension of sentence, must be exercised by the Court at the time of the rendition of the judgment, and such parole or suspension of sentence must be included therein and become a part thereof, and can not be revoked at a date subsequent thereto."

Obviously this holding is based upon the fact that the statute required that the suspension of sentence be made at the time the judgment is entered and be a part there-

of. It goes without saying, that the trial court had not attempted to comply with the state statute, if it in fact assumed to act thereunder, as the order was one annulling the jail sentence entirely and remitting the fine, which is neither parole nor suspension of sentence. This case does not support the Government's contention in any particular, as the holding was based entirely upon the terms of the statute, and the Government concedes that it is not necessary under the Federal Probation Act that probation be granted at the time of pronouncing judgment, but may at all events be granted at any time prior to the expiration of the term at which the sentence is pronounced.

The Government likewise relies on two Montana cases, to-wit: *State Ex Rel Reid* v. *District Court*, 68 Mont., 309; 218 Pac., 558, and *State Ex Rel Bottomly* v. *District Court*, 73 Mont., 541; 237 Pac., 505. These cases arose under Chap. 21, laws of 1913, Sec. 12078-12086, laws of Montana. In the first case the Supreme Court of Montana held that the order granting a suspension of sentence and placing the defendant upon probation had to be made at the time of the entry of the judgment and be a part thereof, indicating that if it was done at a later date it would constitute an encroachment on the pardoning power of the Governor. However, in the latter case the Court expressly repudiated that notion, and held that to grant probation constituted no encroachment upon the pardoning power of the Governor, as the sentence still remained in existence and was no different than a parole by a parole board, which

had been held by all the Courts not to encroach on the pardoning power. In the course of its opinion in the Bottomly case, at page 526, the Court said:

> "Since the only limitation imposed by the statute is that the order of suspension be made before the defendant is committed, this Court should accept it as expressing the Legislative will that no other limitation was intended to be imposed."

It will be observed, then, that the Supreme Court of Montana, in its final disposition of this question, held that probation could be granted at any time prior to the entering upon the service of the sentence of imprisonment and that probation could not be granted thereafter, because the statute contained an express limitation that it should not be granted after service of the sentence had commenced. The Court's statement that it must accept the statute as explaining the Legislative will is important. Applying this reasoning to the Federal Probation Statute, we submit that there is no limitation as to the time within which the power to place upon probation shall be exercised, except that it shall be after conviction or after a plea of guilty or nolo contendere, and except that it shall be made to appear to the satisfaction of the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby.

The Government relies on the case of *State Ex Rel Zabel* v. *Municipal Court*, 179 Wis., 195; 190 N. W., 121. This case was decided under a statute which says: "When any adult is convicted of a felony punishable by

imprisonment for a term not exceeding ten years * * *, and it appears to the satisfaction of the Court * * *, said Court may, except as otherwise provided for by law, by order, suspend the judgment or stay the execution thereof and place the defendant on probation * * *."

In said case the trial court entered an order placing the defendant upon probation while the case was pending on appeal, the mandate not having been returned. The Court, however, anticipated that a new order placing defendant upon probation might be sought to avoid the objection that the case was pending on appeal and announced its conclusion that the trial court would still be powerless to grant probation since the term of court at which defendant was sentenced had long since expired and the judgment and sentence had become the judgment and sentence of the Appellate Court. The Court in its opinion, Page 200, observes that the statute does not prescribe the time during which the power to "suspend the judgment or stay the execution thereof and place the defendant upon probation" is to be exercised. While this may be true, yet this statute in at least two respects is different from the Federal statute, (1), that it uses the present tense, when "any adult is convicted," and (2), says "except as otherwise provided for by law." The first statement might be construed as indicative of a Legislative intent to prescribe that the probation must be granted when the person is convicted. The second might be indicative of a Legislative intent not to change the existing rule of law regarding the loss of control of

the judgment at the expiration of the term. At all events, no such provisions are contained in the Federal Probation Act, and if such provisions are not sufficient justification for the judgment rendered by the Wisconsin Court, then the holding is in direct conflict with the decisions of four United States Circuit Courts of Appeal, as already pointed out.

STATUTORY CONSTRUCTION

A cardinal rule of statutory construction is that where the terms of the statute are unambiguous and do not involve an absurdity, it is the duty of the Court to give effect to the language as written regardless of any supposed notion as to what might afterwards seem advisable that the law-making body should have provided for. This rule is no better illustrated than by the Honorable Supreme Court's interpretation of what is commonly known as the White Slave Traffic Act. In the famous Caminetti case, 61 L. Ed., 442, this Honorable Court held that irrespective of the fact that Congress might have intended the Act to apply only to commercialized vice or traffic in women for gain, and not to mere personal episodes between men and women, which was practically conceded, the Act by its plain terms covered both situations, and that the Court could not by construction exclude from the operation thereof cases of mere personal episodes. The Court said:

> "It is contended that the Act of Congress is intended to reach only commercialized vice, or the traffic in women for gain, and the conduct of petitioner, however reprehensible in morals, is not

within the purview of the statute, when properly construed in the light of its history, and the purposes intended to be accomplished by its enactment. It is elementary that the meaning of the statute must, in the fist instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body that passed it, the sole function of the court is to enforce it according to its terms. Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meaning need no discussion."

In the case of *Hamilton* v. *Rathbone*, 44 L. Ed., 219, the Supreme Court said:

> "But where the Act is clear upon its face, and when standing alone, it is fairly susceptible of but one construction, that construction must be given to it."

In the case of *Holy Trinity Church* v. *United States*, 143 U. S., 457, Justice Brewer, speaking for the Supreme Court, said:

> "The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language he has used. * * * No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

The rule of statutory construction laid down in the foregoing cases is in substance the same rule applied to the construction of written instruments, to-wit, that

where they are unambiguous, their meaning must be found in the language that has been used, and that it is not competent to look to the discussions leading up to the making thereof or the understanding of the parties in arriving at what it meant. Applying this rule to the Act in question, we submit that the Act is plain and empowers the Court of original jurisdiction to place upon probation a defendant convicted at a term that has long since expired and who is serving his sentence in the penitentiary; that the statute contains no limitation on the time when the power shall be exercised except that it shall be "after conviction or after a plea of guilty or nolo contendere" and that "it shall appear to the satisfaction of the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby." As already pointed out, four United States Circuit Courts of Appeal have held that to hold that the statute did not apply where the term at which the sentence was imposed had expired, would be reading into the Act a limitation not written there by Congress. It would be, as we view it, providing by judicial construction, something which according to individual notions might seem wise to have been provided for, which this Court, in the case of *Holy Trinity Church* v. *United States*, ante, said should not be done. Let us go a step further and assume that the statute applies, even though the term has expired, and consider the question of whether or not it applies where the party has entered upon the service of the sentence in a jail or penitentiary. What language in the statute indicates that the line should be

drawn at that point? We submit that there is no such limitation in the statute and that the Court should not read such a limitation into it, regardless of what might be thought was the individual intention of the members of Congress who passed the law.

ADVISABILITY OF CONSTRUCTION CONTENDED FOR FROM STANDPOINT OF SUPPOSED BENEFICIARIES THEREUNDER

If it is finally held that the statute does not apply where the term of Court at which the judgment and sentence were entered has expired, then it is obvious that some of the humane purposes obviously intended by the law-makers will not be accomplished in those cases where persons convicted feel themselves so aggrieved that they take an appeal to the Circuit Court of Appeals, for it is common knowledge that with the crowded dockets as they now exist and probably will continue to exist, the term of Court will long since have expired before the mandate is returned. We can not believe that there is any sound reason why a party should be cut off from the benefits of the probation law, simply because he appeals his case. There may be those who entertain the idea that this constitutes a defiance and that therefore, one appealing should not expect any of the mercies provided by the probation law. But the better opinion seems to be that since one has a right to appeal from a conviction, and there are occasionally persons who are unjustly convicted, that no punishment should result from an appeal.

On the other hand, if it is finally held that the fact that the term of Court has expired makes no difference to the granting of probation, but that it can not be granted after the service of the sentence has commenced, no relief can be granted to persons receiving merely a jail sentence, as the parole law does not apply to them and ordinarily they pass into the custody of the marshal immediately upon being sentenced, to commence the service of their sentences. The argument is advanced that the probation law should not apply to a person serving his sentence in the penitentiary, upon the ground that the parole law is sufficient to prevent unjust punishment. But what is to become of the persons who receive merely jail sentences who can derive no benefit from the parole law? In both cases, if the Government's contention is to prevail, they will be cut off from the benefits of the Probation Act simply because they have entered upon the service of their sentences. For example, take the Murray case, now pending in this Court. There a jail sentence was imposed, and it must be conceded that the parole statute affords no relief for Murray. The foundation of the Government's contention rests not upon the character of the institution in which the prisoner is confined, but merely upon the fact that the Probaton Act has in no manner changed the then existing rule of law that the Court loses absolute control of the judgment when the defendant enters upon the service of the sentence.

It will not be seriously contended that Congress did not have the power to pass a law giving the Court of

original jurisdiction the power to place upon probation persons serving their sentences in the penitentiary. There is no conflict between the parole law and the Probation Act, upon the same theory that there is no conflict in the parole law and the pardoning power which is vested in the President. It is simply a question of what Congress has done by the passage of the Act.

ADVISABILITY OF CONSTRUCTION CONTENDED FOR FROM STANDPOINT OF WHETHER DISTRICT COURTS SHOULD BE ENTRUSTED WITH THE POWER

Were it permissible to consider what may have been in the minds of the individual member of Congress, still we see no reason for concluding that Congress should not have intended the statute to apply to those persons already serving their sentences. Certainly Congress was providing a remedy and had in mind that the existing laws were wholly inadequate in that the parole law which had long been in force and effect, the law allowing a certain time for good behavior (Comp. S. 10532) and the pardoning power vested in the President, were wholly inadequate, otherwise it would not have thought that there was any necessity for providing a new remedy. The pardoning power in scope was broad enough to cover the case of every person convicted, but as a practical matter it was inadequate, and therefore the parole law was passed. This law provided a remedy for only those persons who were in the penitentiaries and had

served a third of their term of imprisonment (Comp. S. 10535). It did not cover the cases of persons sentenced to serve terms of imprisonment in jail. As the law had wisely surrounded the person charged with the commission of an offense with every safeguard to prevent his unjust conviction, undoubtedly Congress deemed it expedient and proper to surround those already convicted, or that might be convicted, with every safeguard against unjust punishment after conviction. The Government's position on the advisability of the construction of this statute, for which we contend, seems to be substantially the same as that expressed by Judge Pollock, to-wit: That to give such an interpretation to the probation statute would permit the courts to invade the penal institutions of the country and take therefrom persons serving their sentences. But why should this be alarming or be considered unwise? Surely the District Judges who have exercised the discretionary power of imposing sentences that might range from a one-dollar fine to many years in the penitentiary can be entrusted to administer the probation law fairly and to the best interests of society. In most instances they are far more familiar with the actual facts than any other person or body entrusted with the granting of any character of clemency. Usually they are in a far better position to discover the existence of facts and circumstances which point conclusively to the fact that the best interests of society and the convict will be best subserved by leniency being granted. So that from the standpoint of what might now seem wise for Congress to have pro-

vided for, we submit that there is no logical reason why one should conclude that Congress did not intend the Act to apply to those persons serving their sentences.

LOOKING TO COMMITTEE REPORTS AND CONGRESSIONAL DEBATES FOR AID IN INTERPRETING THE ACT

Assuming it to be proper to look to committee reports and congressional debates preceding the passage of the Probation Act for aid in interpreting the same, which we think is doubtful, as the language of the Act is plain, we submit that because these show an intention to pass a probation act in line with acts passed by the various States of the Union is no ground for concluding that the Act in question was not intended to apply to those persons already serving their sentences in the penitentiary, for at least two State statutes then in existence have been held to apply to persons serving their sentences, to-wit: That statute of Ohio in the case of *Antonio* v. *Milliken*, 9 Ohio App., 356, and the South Carolina statute in the case of *State* v. *Teal*, 108 S. C., 455; 95 S. E., 69. We contend that it does not appear from the congressional record, or anything that the Government advances in connection therewith, that in passing the Act, Congress was attempting to pattern after any particular act. Since the State statutes on this subject are by no means uniform, and under the language of some the Courts have held that persons already incarcerated are the beneficiaries thereof, and under the language of

others they have held otherwise, the statute in question must be interpreted by the language in which it is framed.

The Government contends, however, that the decisions of the New York Courts are in point, as the New York probation statute was one of the laws used as a model for the Federal law. The New York probation law in force at the time the Federal statute was enacted, as is admitted by the Government in its brief, in opposition to the granting of the writ of certiorari herein, reads in part as follows:

> "A court * * * may suspend sentence or impose sentence and suspend the execution of the whole or a part of the judgment and may in either case place the defendant on probation in accordance with the provisions of section eleven-a of the code of criminal procedure * * * Provided, however, that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced." (Sec. 2188, Criminal Code, 1924).

If Congress did not intend the Act to apply to persons already serving their sentences of imprisonment, why did they not insert a provision expressly so stating, like the one contained in the New York law? It seems to us to be reasonable to suppose that if the law-makers were pattering after the New York law and intended that the Act should not apply to those persons serving their sentences of imprisonment, they would have done just what the law-making body in New York did—insert a provision expressly so stating. The fact that they did not do

this, is an indication that they did not intend to follow the New York law to that extent.

It may be suggested by the Government that from the fact that the Committee Report on the bill in question shows that it was not intended to pass anything radical, that the Act should not be applied except to those cases that would arise in the future, or at least before the term of court at which the prisoner had been sentenced had expired, and in no event to those persons confined in the penitentiary, since this would abrogate the long existing law that after the term of court has expired the court loses control of the judgment, and likewise the long existing law that in the absence of statutory authority the court loses control when the person enters upon the service of the sentence. Of course a change was brought about by the passage of the Probation Act, but we do not think that any radical change can be held to have been effected thereby, even though the control of the judgment is vested in the trial court, until it has been fully satisfied. It is conceded by the Government, and as a matter of fact was decided in the case *Ex Parte United States*, 242 U. S., 27, that as the law then existed the court did not have the power to suspend the imposition of sentence after conviction. Certainly so far as suspending the imposition of sentence is concerned a very emphatic change in the law has been brought about by the passage of the Probation Act. The old law was overturned, and a new condition of affairs in this respect brought about. Certainly if the change for which we

contend might be considered radical, so should the change admittedly effected be considered radical, to say nothing of the change that has been effected if it is held that the statute applies notwithstanding the expiration of the term.

CONSTITUTIONALITY OF THE PROBATION ACT

As to the constitutionality of the Probation Act, we do not think there is much ground for the entertainment of any serious doubt on this subject. To begin with, a Probation Act of this general character had the advance approval of the Supreme Court of the United States, 242 U. S., 27, in which the Court in substance recommended that such an Act be passed to the end that the District Courts might be in a position to deal more justly with those persons convicted of crime. In the second place, the Act was specifically passed upon and upheld by the Circuit Court of Appeals for the Ninth Circuit in the case of *Nix* v. *James*, 7 Fed. (2nd), 590, and the conclusion of the Court on this question in that case has been impliedly, if not expressly, approved by the decision of each of the courts that have passed on the Probation Act in any form. At all events, no case has held or even indicated that the statute might, for any reason, be unconstitutional. Substantially the only ground advanced is that it might be an encroachment on the pardoning power of the President under the Constitution. The Parole Act passed June 25, 1910, was not considered as violative of the Constitution, or an encroachment on the

pardoning power, and that statute has been expressly passed upon in the following cases:

Anderson v. *Carroll*, 263 U. S., 192; 68 L. Ed., 247;
O'Brien v. *McClaughry*, 209 Fed., 819;
Thompson v. *Duehay* (D. C.), 217 Fed., 484; affirmed (C. C. A.), 223 Fed., 305.

While the pardoning power granted to the President is exclusive, the granting of parole under the Parole Act was not considered an encroachment on the pardoning power upon the ground that the granting of parole merely suspends the execution of operation of the sentence so far as incarceration is concerned, while a pardon overrides and does away with the conviction, judgment and sentence. The granting of probation under the Probation Act, like the granting of a parole, does not wipe out the sentence, but merely suspends for the time being its execution in the manner and place designated in the original judgment, leaving the offender subject to be placed in confinement in accordance with the original sentence, should the Court see fit to revoke the probation.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the trial court, granting petitioner probation, be in all things affirmed.

Respectfully submitted,

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Counsel for Petitioner.

November, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 394

THE UNITED STATES OF AMERICA

v.

GLEN MURRAY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

As the case comes here on certificate, there is no opinion by the Circuit Court of Appeals. The decision of the District Court has not been reported.

JURISDICTION

Jurisdiction is conferred upon this Court by Section 238, Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

[illegible] the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, 43 Stat. L., Chap. 578, page 1259, to

make, during the term at which sentence was imposed, the order placing defendant in error upon probation after he had commenced to serve the sentence?

THE STATUTE

Sections 1 and 2 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1259 (U. S. C., Title 18, Secs. 724, 725), provide:

> SEC. 1. That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation as to the sentence aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years.
>
> While on probation the defendant may be required to pay as one of several terms a fine imposed at the time of being placed on probation and may also be required to make

restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

The facts in this case are set out in the certificate on page 1 as follows:

On October [illegible], 1931, on the District Court of the United States for the District of

Nebraska, defendant in error plead guilty to certain violations of the national prohibition act. On October 25, 1926, he was sentenced under said plea of guilty to a term of three months imprisonment in the Douglas County jail at Omaha, Nebraska. On the 25th day of October, 1926, he was delivered by the United States marshal, in pursuance of said judgment and sentence, to the jail keeper, and on said date he commenced serving his sentence. On October 26, 1926, and during the same term of court, the court entered an order placing the defendant in error on probation, said order in part reading as follows:

"Ordered and adjudged, that said defendant, Glen Murray, be placed on probation for the period of two (2) years, under the personal supervision of Robert P. Samardick, who is hereby appointed and constituted probation officer in this case."

Defendant in error was thereupon released and placed in charge of said Robert P. Samardick.

It is the contention of the Government that probation could not be granted by the District Court after defendant in error commenced serving his sentence.

SUMMARY OF ARGUMENT

The case is not moot. It seems that if the probation order is void the defendant may be recommitted; but if this be not so, there is still substance to the case, as its decision will determine whether

continued supervision and partial restraint under probation must be continued until 1928.

The Probation Act does not confer upon the District Courts the power to release a defendant on probation after he has commenced to serve his sentence, and the exercise of such power is contrary to established rules of procedure and is in contravention of the clear meaning of the statute and the purpose for which it was passed.

Prior to the enactment of the Probation Act the Federal courts had long observed the well-known rule of law which prohibits a sentence from being set aside or altered after the defendant enters upon the execution of a valid sentence, even during the term at which the sentence is imposed. As the Probation Act contains no provision which would modify this rule, it applies here and is of itself sufficient to prevent the District Court from releasing the defendant on probation.

The wording of the statute is in harmony with the rule just referred to, for although there is no definite expression as to time given, the language used actually confines the time when a person may be placed on probation to the period between conviction and commitment. The language of the statute also gives effect to its purpose, which, according to the report of the House Judiciary Committee (House Report No. 1377, 68th Congress, 2nd Sess., p. 2), is to provide a system of probation in the Federal District Courts and thereby give "an opportu-

nity to reform to certain offenders without the hardship, the expense, and the risk of subjecting them to imprisonment." As the report points out, the Act is the direct result of the decision of this Court in *Ex parte United States*, 242 U. S. 27, holding that a Federal court had no power to suspend a sentence, and is complementary to the Parole Act and other existing laws which were inadequate to meet the situation.

All the decisions rendered by the Circuit Courts of Appeals, and all others by District Courts except one, which touch on the question presented here, support the contention of the Government or are consistent with it, and these Federal decisions are in accord with State cases arising in States where the probation laws are similar to the Federal statute.

ARGUMENT

I

THE CASE IS NOT MOOT

At the threshold of this case we are confronted with a question as to whether the case may not be moot in the Circuit Court of Appeals. The certificate shows that the defendant was sentenced on October 25, 1928, to a term of three months' imprisonment. The record in the Circuit Court of Appeals shows that in the judgment it was provided that the sentence should run from October 25, 1928. Defendant entered the jail and began to serve his sentence on October 25, 1928. On October 26th he was released on an order issued by the Dis-

trict Judge placing him on probation for two years in the custody of a probation officer, and he has continuously since remained under the control of that officer. The period of his sentence, if computed from the date set by the District Court, October 25, 1926, has long since expired. However, the law seems to be that a date mentioned in the sentence as the time when that sentence is to begin is not, strictly speaking, a part of the sentence. *Bernstein* v. *United States*, 254 Fed. 967 (certiorari denied, 249 U. S. 604).

The case is clearly not moot if the defendant may be recommitted to the penitentiary to serve the remainder of the jail sentence imposed because the order for probation was void. To sanction such recommitment, it must be assumed that the defendant's sentence having been interrupted by a void order and he having been at large in a void probationary custody, he may be recommitted under the doctrine of "constructive escape." The authorities on that subject are by no means uniform. The line of demarcation between them is discussed in the case of *Morgan* v. *Adams*, 226 Fed. 719, where the Circuit Court of Appeals for the Eighth Circuit said (p. 721):

> It is sufficient to say that the conclusion forced upon our minds is that, if the order suspending such a sentence is illegal, it is so not because it is irregular or technically defective, but because it is beyond the power of the court, and it is therefore void, and the

> sentence stands, and is enforceable by the court at any time after its rendition, either before or after the term of the court, *until the convict has suffered the penalties it imposes.* (Italics ours.)

The following comment from *State* v. *Abbott*, 87 S. C. 466, 473, is pertinent:

> The reasoning of the cases first cited we think sophistical, because it rests upon the false assumption that a sentence necessarily begins to run and to be satisfied the moment it is pronounced. The execution of a sentence may be postponed by appeal, by escape *and by other causes*, but the time of delay in the execution is not counted as a part of the time of imprisonment fixed by the sentence. No more can the delay due to the release of the convict under a void order of the Court attempting to suspend the sentence be so counted. The sentence is satisfied, not by the lapse of time after it is pronounced, *but by the actual suffering of the imprisonment imposed by it.* The rule is that jurisdiction remains in a Court to enforce its valid judgments according to law against those who are parties to them * * *. * * * The following cases hold that, as the attempt to suspend was of no effect, the sentence is not satisfied until it has been actually suffered. *Neal* v. *State* (Ga.), 30 S. E. 858; *Gray* v. *State* (Ind.), 8 N. E. 16; *Miller* v. *Evans*, 91 Am. St. 143 (Iowa); *State* v. *Cockerham*, 24 N. C. 204. (Italics ours.)

In *Steere* v. *Field*, Fed. Cas. No. 13350 (2 Mason 486), Justice Story, on circuit, considered the doctrine of constructive escape in deciding whether at common law it constituted an escape for the "gaoler" to allow prisoners the liberty of all the compartments within the jail walls. After an exhaustive review of historical authorities, which he said he "felt necessary, because there is a diversity of opinion among American judges, as to what the common law on this subject is," Justice Story applied the test whether in each case the prisoner is "kept in salva et arcta custodia." He decided that the giving a prisoner free access to all compartments within the prison walls was not a constructive escape, since that would still be safe and close custody, but that to give the prisoner the keys of the institution and the position of assistant custodian did constitute a constructive escape.

If the order releasing Murray on probation was void, then it follows that the restraint imposed upon him by the probation officer in execution of said order was also void. As a consequence, the prisoner would be deemed to have been "at large"; the doctrine of constructive escape would apply to the period since October 26th, and his prison sentence would be considered as having been interrupted during the time he was released under the void probation order, so that now he could be returned to suffer the penalties his original valid sentence imposed.

In the case of *Anderson* v. *Corall*, 263 U. S. 193, it is said (p. 196):

> Mere lapse of time *without imprisonment or other restraint contemplated by the law* does not constitute service of sentence. Escape from prison interrupts service, and the time elapsing between escape and retaking will not be taken into account or allowed as a part of the term. *Dolan's Case*, 101 Mass. 219, 222; *Petition of Moebus*, 73 N. H. 350, 352. (Italics ours.)

But in deciding whether the case is moot it may not be necessary to decide whether the defendant may be recommitted. Even upon the assumption that the doctrine of constructive escape may not be invoked herein so as to return Murray to the penitentiary to serve the balance of the sentence, it would still seem that enough substance remains in this litigation to justify a reply by this Court to the question brought here by the certificate. The prisoner is still under restraint and is required to report at intervals to the probation officer, who is an agent of the court. From time to time this officer expends money in performing the duties of supervision over the prisoner. If the order for probation is void, this supervision should cease. Substantial rights of the prisoner are also involved in determining the validity of the District Court's order. Under the terms of the probation he can be arrested without a warrant by the probation officer, be brought before the court and tried without a jury, and a substantial fine or commitment to jail imposed, and

it is within the power of the court to extend such supervision over him for a period of five years from October 26th. By the express terms of the order of probation the Government has responsibility for this prisoner until October 26, 1928. If the order of probation is void, then the prisoner should either be freed and the Government's responsibility over him cease or he should be recommitted to jail.

II

THE LIMITATION ON THE POWER OF A FEDERAL COURT TO ALTER A SENTENCE AFTER EXECUTION HAS COMMENCED HAS NOT BEEN CHANGED BY THE PROBATION ACT

Prior to the passage of this Act, the law was well settled that the courts' power of control over defendants *ended* at the hour of commitment. The general rule, long observed by both the State and Federal courts, is stated by the Circuit Court of Appeals for the Eighth Circuit in *Stewart* v. *United States*, 300 Fed. 769, decided June 12, 1924 (p. 777):

> An examination of the authorities leaves no doubt that the established rule is that courts have the jurisdiction and authority, during the term at which their orders, judgments, and decrees are made, to set them aside and substitute others for them, or to amend or otherwise modify them, *until or unless they have been executed in whole or in part*, or the rights of third parties will be injured by such action, and cases in which pleas of nolo contendere have been filed and

> accepted by the court are not exceptions to this rule. (Italics ours.)

This rule was also discussed by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Howe*, 280 Fed. 815, which held (p. 819):

> • • • while a court has, as a general rule, power over its judgments during the term, its power over them is clearly subject to certain restrictions. Thus it has been held that, after a sentence has been pronounced, but before the final judgment has been signed, the court may change the sentence. • • • *Ex parte Lange* itself clearly indicates one of such restrictions. And another restriction is that *if a sentence has been put into operation, and the person sentenced to imprisonment has been actually committed to prison and commenced to serve his term, the power of the court to alter or amend the sentence is gone.* (Italics ours.)

In *Ex parte Lange*, 18 Wall. 163, which is referred to in the above decision, this Court held that a second judgment could not be rendered even during the same term or when the first was erroneous if the sentence was partially executed.

The Probation Act has enlarged the powers of the courts in regard to the disposition of defendants, but, as its wording indicates, this grant of power is to be executed only "after conviction or after a plea of guilty," which plainly is just an enlargement of the courts' range of discretion in sentencing, and not a shift of the courts' authority beyond the an-

cient natural limit. To give the latter construction to the Act would be to impute to Congress an intent to create a region of overlapping authority between the courts and the executive. Such a construction is unnecessary to the effectiveness of the Probation Act and it is unlikely that Congress intended to create a period during which both executive and the courts could deal with defendants.

There must be a definite limit to the power of the judiciary, and it is a part of our law that this limit be placed at the prison door. The line of demarcation between the judicial and executive branches of the Government is very well stated in the following excerpt from *Miller* v. *Snook*, 15 F. (2d) 68, 69:

> * * * Discretion is given the courts in fixing punishment before execution begins, but after *execution commences the prisoner is considered to be beyond the power of the court and in the hands of the executive.* The rights of prosecution and prisoner then become fixed. By losing possession of the prisoner, the court loses control of his case, unless control is resumed by some proper proceeding, such as a motion for a new trial or a habeas corpus. The executive may afterwards commute or pardon, but the judge can do neither. Yet the effect of his then altering or reducing the sentence would be commutation or pardon to that extent.
>
> Considering our frame of government, it would seem that the power of the court

> should logically end when the prisoner passes into the custody and control of the executive under a legal and valid sentence. The commitment is the document which marks the surrender by the court to the executive of the prisoner. It is issued by the clerk of the court to the keeper of the prison and in the name of the President, and authorizes the prison keeper to receive and hold the prisoner. In a jail sentence, when a prisoner is actually committed to jail, unquestionably he is in the hands of the executive for the execution of that sentence. (Italics ours.)

With this division of powers between the judiciary and the executive so well established as a part of our law it is unreasonable to hold that the Probation Act, with no provisions inconsistent with this division of powers, has worked a change in this respect and was intended to confer authority on the courts to exercise powers which have heretofore been considered executive in their nature. Such a construction would raise a serious constitutional question. In regard to this, when a similar question arose in *Archer* v. *Snook*, 10 F. (2d) 567, it was said (p. 568):

> • • • The limitations on the power of the court to alter a sentence, even during the term, when it has gone into execution, are well recognized. See 12 Cyc. 783; *In re Lange*, 18 Wall. 163, 21 L. Ed. 872. The interference by a judge with a closed sentence, after the prisoner has been delivered in execution to the executive authority, is at least

> so close to an exercise of the pardoning power, which is held to include commutations and conditional pardons (*United States* v. *Wilson*, 7 Pet. 150, 8 L. Ed. 640; *In re Wells*, 18 How. 307, 15 L. Ed. 421), that it should not be attempted, unless on the clearest legislative warrant.

Plainly Congress intended in the Probation Act to confer upon the courts enlarged discretionary powers to weigh the interests of society and the defendant in the imposition of punishment, but supplementary to and not intrusive upon the executive's power to pardon or parole.

III

NEITHER THE LANGUAGE OF THE PROBATION ACT WHEN CONSIDERED AS A WHOLE NOR THE DECLARED PURPOSE OF CONGRESS IN PASSING IT IS CONSISTENT WITH THE GRANTING OF PROBATION AFTER COMMITMENT

(A) *Consideration of the Language of the Statute*

Although the Probation Act does not contain a definite expression as to the length of time after conviction in which courts may grant probation, the language used plainly indicates that the courts' powers do not extend beyond the time of commitment. Section 1 of the Act provides that "after conviction or after a plea of guilty or nolo contendere" the court shall have power "to suspend the imposition or execution of sentence and to place the defendant upon probation." The language of

this provision forestalls the contention that the Act contains no terms limiting the time, for the words used are in themselves a limitation.

However, the District Court has apparently construed the statute as if it read "the court shall have power to suspend the execution of the whole sentence or a part thereof." There is no reason for reading such provision into the law, and there is, in fact, good reason to believe that Congress purposely omitted all references to the whole or part of the sentences. It is a matter of record that the New York Probation Law was one of the laws studied by Congress in drafting the Federal Law. (House Report No. 1377, p. 3, 68th Congress, 2nd Sess.) At that time the New York law did contain a provision for suspending execution of the whole or a part of the judgment. Such provision was apparently the source of much confusion and the cause of an amendment in 1920 providing "that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced." (Sec. 2188, N. Y. Criminal Code, 1924.) The amendment really nullified the effect of the provision referred to above, and in 1925, but after the Federal law was passed, the New York law was amended to omit such references entirely. It seems safe to assume that Congress did consider these provisions which were then in the law and deliberately left them out of the Federal law.

Therefore, in the absence of any qualifying words, we contend that the word "sentence" is to be taken as a unit, and that probation must be granted before any part of the prison sentence is executed. The Government's view is expressed by the District Court of Kansas in *Mouse* v. *United States*, 14 F. (2d) 202, 203:

> Does this language mean the further execution of a sentence being served may be suspended at any time before the same has been fully performed? If so, then all convicts may, at any time during the period of the term of confinement in prison, make the application.
>
> I am forced to the conclusion this view of the act is not that expressed or intended by the Congress; on the contrary, that the suspension of the imposition or execution of sentence as by Congress intended was *applicable to that period between conviction and the beginning of the execution of sentence*, at which the court has retained jurisdiction over the cause and the power to change or modify its judgment of conviction, and that it was not the view of the law-making power the Probation Act in question should permit the court to invade the penal institutions of the country at any time during the term of imprisonment, and after all jurisdiction over the subject matter and the person of the offender has been lost. (Italics ours.)

The language used in other portions of the Act also supports this view. The following alternative

clauses, which appear in Section 1 of the Act, imply that Congress is not authorized to make partial execution of a prison sentence a condition of probation:

> That the courts * * * shall have power * * * to suspend the imposition or execution of sentence and to place the defendant upon probation * * * or *the court may impose a fine and may also place the defendant upon probation in the manner aforesaid.* (Italics ours.)

In commenting on these alternative clauses the District Court for the Northern District of Georgia in *Archer* v. *Snook*, *supra*, said (p. 569):

> This broad language might have been considered sufficient to permit making the payment of a fine or the suffering of an imprisonment one of the conditions of the probation. But that such was not the meaning of Congress appears from the immediately following words: Or "may impose a fine and may *also* place the defendant upon probation *in the manner aforesaid.*" This makes it clear that probation "*in the manner aforesaid*" could not have included the payment of a fine. Much less could it include an imprisonment, to prevent which, in proper cases, was the main object of the law. Succeeding sentences of the law mention a variety of things which may be required of the probationer, but imprisonment is not among them. It may come only on revoking the probation. The court, therefore, after ascertainment of guilt, must, with no other

> delays than have heretofore been permissible, either suspend sentence and establish probation, which may, if unsuccessful, be revoked and sentence then pronounced, or may pronounce the sentence ordinarily appropriate to the offense, but before it goes into execution may suspend it, and establish in lieu of it probation, subject to revocation and execution of the sentence later. It may, by express provision of the act, in any probation, make the payment of a fine a condition of it, but in none may it make imprisonment under the sentence such. It can not, therefore, impose an imprisonment sentence, and provide for its suspension and for probation after it is partly executed. This applicant, therefore, can not have his discharge on the attempt to provide therefor in this sentence, but must place his case before the parole board.

If the statute prohibits a court, as is indicated in these alternative clauses, from making a partial execution of a prison sentence a condition of probation, it can hardly be urged that the courts are allowed to accomplish the same result by deferring the announcement of probation until after the sentence has been partially executed.

The statute contains still another reference which is of assistance in determining the time when probation may be granted. The power to impose a fine and to grant probation contained in one of the alternative clauses quoted above is given without any definite expression as to the time these powers

may be exercised, but it seems clear that Congress intended the fine and probation to be given simultaneously, as is indicated in the following provision; also in Section 1:

> While on probation the defendant may be required to pay in one or several sums *a fine imposed at the time of being placed on probation* • • •. (Italics ours.)

The language of the foregoing provisions precludes the Act from being construed to apply to persons already incarcerated.

(B) *The Purpose of Congress in Passing the Probation Act*

In a memorandum prepared by the National Probation Association and attached to the report of the House Judiciary Committee when the bill was presented in its final form (House Report No. 1377, 68th Congress, 2nd Sess., p. 2), the purpose of the Act is stated as follows:

> The purpose of this bill is to provide a system for the use of probation in the United States district courts in line with statutes now in effect in a large majority of the States. • • •
>
> Probation is the method by which the court disciplines and gives an opportunity to reform to certain offenders *without the hardship, the expense, and the risk of subjecting them to imprisonment.* • • •
>
> • • • It frequently happens that the same or a similar offense is committed by a hardened repeater who is deserving of no

mercy at the hands of the court, and by a young boy, a first offender who has been led into crime by evil associates or bad environment, who after his detention and trial is thoroughly repentant and capable of becoming an upright citizen if extended a helping hand upon his release. In many such cases probation is not only the humane but the practical and effective treatment, *avoiding the disgrace and stigma of a prison sentence.* * * *

Before the decision of the United States Supreme Court in the so-called Killits case, rendered in December, 1916 (Ex parte U. S. Petitioner, No. 11, original), the United States district courts suspended sentence in many instances * * *.

As a result of the decision of the Supreme Court bills for this purpose have been introduced in Congress at each session since. * * *

The United States district courts, unlike nearly all State courts, have to-day absolutely no legal power to suspend sentence or use probation. * * * In extreme cases of children and young first offenders, where removing them from a good home and sending them to a penal institution seems unnecessarily drastic, and where a fine can not be paid, certain judges now adjourn these cases for an indefinite period, requiring them to report at stated times to an officer of the court. * * *

The parole laws and pardoning power of the President are not adequate to meet the need for a probation system. Under the

parole law the defendant must be committed and serve at least one-third of the sentence in full. This usually means six months' sentence, and always means the branding of the delinquent as a convict and taking him away from his environment and associates in disgrace. The result of long experience with the probation system shows that it is far easier *to reclaim an unhardened early offender without commitment to a prison than after it.* The presidential power of pardon is subject to the same criticism and can naturally only be exercised in special cases. * * * (Italics ours.)

This bill is modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work. Its principal provisions are as follows:

SECTION 1. *Suspension of sentence and placing on probation.*—The United States courts of original jurisdiction are authorized to suspend sentence and place offenders on probation in all cases except those punishable by death or life imprisonment. * * *

The foregoing indicates clearly that Congress when enacting this statute had in mind defendants who had not yet been committed, and that it intended the Probation Act to be complementary to the Parole Act, which was inadequate to meet the situation. Therefore, to hold that the Probation Act was designed to give relief to prisoners is to deny the true purpose of the Act, for as it was said in *Archer* v. *Snook, supra* (p. 568):

> By their incarceration, the shame, stigma, and criminal contact, which the probation system sought in proper cases to avoid, will have already been accomplished.

IV

THERE IS NO CONFLICT OF DECISIONS ON THE QUESTION OF ALLOWING THE RELEASE OF A PRISONER ON PROBATION AFTER HE HAS COMMENCED TO SERVE HIS SENTENCE

All of the decisions of the Federal courts, except the instant case and one other in a District Court, which touch on the question presented here, are either in support of the Government's contention or are consistent with it. None of the decisions rendered by Circuit Courts of Appeals are opposed to the Government's views.

Nix v. *James*, 7 F (2d) 590, decided by the Circuit Court of Appeals for the Ninth Circuit on August 3, 1925, was the first reported case arising under this statute and does not touch on the point raised here, except indirectly in the following statements (pp. 593, 594):

> In other words, defendants sentenced at terms * * * prior to March 4, 1925, and *who have not yet been imprisoned*, may come within the mischiefs which Congress intended to remedy * * *.
>
> * * * * *
>
> Nothing contained in this opinion must be construed as holding that the Probation Act has any application to a defendant who has entered on the service of his term of imprisonment. (Italics ours.)

In *Kriebel* v. *United States*, 10 F. (2d) 762, the Circuit Court of Appeals for the Seventh Circuit stated that the question of whether the Probation Act was applicable to a defendant who had begun the service of his term of imprisonment was not before it.

In *Evans* v. *District Judge of the United States for the Western District of Tennessee*, 12 F. (2d) 64, the Circuit Court of Appeals for the Sixth Circuit explained that the record did not show whether the defendant had begun to serve his sentence, but the court said (p. 65):

> We think that jurisdiction to grant probation exists, even as to convictions made and affirmed before March 4, 1925, at least at any time before the execution of the sentence is begun * * *.

In *Ackerson* v. *United States*, 15 F. (2d) 268, the Circuit Court of Appeals for the Second Circuit said (p. 269):

> It is held to be reasonably clear that Congress did intend to permit persons convicted of crime to apply for the benefit of the statute *at any time before actually entering upon the performance of the sentence or judgment of the trial court* * * *. (Italics ours.)

In *United States* v. *Cook*, 19 F. (2d) 826, now pending in this Court on petition for certiorari, Docket No. 539, the question presented is similar to the one raised here with the added feature that the term of court had ended in that case before the

District Court granted probation. The Circuit Court of Appeals for the Fifth Circuit held that the lower court was without authority to release the defendant after the service of his sentence had begun. In explaining that Congress had, before the passage of the Probation Act, enacted the parole and good-time statutes, the court said (p. 828):

> In view of the existence of those statutes, and of the *absence from the Probation Act of any reference to them, or to the subject of releasing from imprisonment persons who have already begun to serve sentences imposed*, the conclusion is warranted that the lawmakers did not intend the Probation Act to empower the courts mentioned to make such an order as the one now in question.
>
> If the Probation Act authorized the making of such an order, each court exercising the power granted may, as to any imprisoned convict, set at naught the limitations and restrictions of the parole and commutation statutes, leaving the system established by those statutes in force only so far as each of the courts mentioned, in the exercise of an unrestricted discretion, may permit it to remain in force. (Italics ours.)

There are six reported decisions by District Courts involving the question presented here. Five of these take the view advanced by the Government in this brief, and are therefore not in accord with the unreported ruling in the instant case. In the sixth, *United States* v. *Chafina*, 14 F. (2d) 622, the

District Court for Arizona placed the defendant on probation after she had served about sixteen months of her sentence. The court said (p. 623):

> It is suggested that the exercise of this power by the court would be in conflict with the Parole Act. Assume that to be true. Congress passed both Acts. It could modify or repeal the Parole Act at its pleasure. The Probation Act was passed subsequent to the passage of the Parole Act and clearly vests this discretionary power in the court, as no limitation of time after which the court may not admit to probation is expressed in the act.

In regard to the repeal of prior laws and in reply to the statement in the *Chafina Case*, the District Court for the Western District of Arkansas said in *Davis* v. *United States*, 15 F. (2d) 697, 700:

> The statement that Congress may modify or repeal the Parole Act at its pleasure is true. There is in the Probation Act no express repeal or modification of the Parole Act. Implied repeals are not favored. If Congress had desired the Probation Act to repeal or modify the Parole Act, or to give to the District Court authority to release a defendant confined in a United States penitentiary outside of the territorial jurisdiction of the court and after the expiration of the term at which the defendant was convicted, it seems to me that Congress would have so stated in express terms.

In the *Davis Case* the defendant's petition was denied on two grounds, one of which was that he was already serving his sentence and therefore ineligible for probation. In three of the four remaining cases—*Archer* v. *Snook, supra; Mouse* v. *United States, supra;* and *United States v. Young*, 17 F. (2d) 129—the defendants had also commenced to serve their sentences, and all were denied probation for that reason. In *United States* v. *Davis*, 19 F. (2d) 536, decided by the District Court for Idaho, the defendant had not yet been committed, and the court stated that, in view of that fact, it still had power to grant probation.

Decisions of the New York State courts are in point, as the New York probation statute was one of the laws used as a model for the Federal law. (See Report of the House Judiciary Committee, *supra.*) The provisions of the New York law in effect at the time the Federal statute was enacted are, in part:

> A court * * * may suspend sentence or impose sentence and suspend the execution of the whole or a part of the judgment and may in either case place the defendant on probation in accordance with the provisions of section eleven-a of the code of criminal procedure. * * * Provided, however, that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced. (Sec. 2188, Criminal Code, 1924.)

In *People ex rel. Paris* v. *Hunt*, 201 App. Div. 573, affirmed in 234 N. Y. 558, it was held that the reference relative to the "whole or a part of the judgment" did not give the court power to interfere with a defendant's sentence after execution had commenced. In that case the Supreme Court of Washington County gave the defendant an indeterminate sentence with a minimum of two and one-half years, but ordered that he be produced in court after a year's service for final disposition. In regard to this order the Appellate Division of the Supreme Court made the following statement, which was later approved by the Court of Appeals (p. 575):

> Under the record here it must be held that at the time the sentence was imposed and before the imprisonment began there was no modification of this judgment affecting the term of imprisonment imposed, and that any other disposition which could be made in the County Court of Bronx county on producing the defendant there would be a disposition modifying the judgment at that time, after the imprisonment had commenced. Such action, we think, is forbidden by the amendment.

A review of other State decisions also indicates that where the laws are similar to the Federal statute the decisions lend support to the view advanced herein by the Government.

In *State* v. *Ensign*, 38 Idaho, 539, the defendant was released by the district court from jail when he had served only about one-half of his six months' sentence. The court tried to justify its action under Section 9041 of the Compiled Statutes of Idaho, which relates to the suspension of sentences and which contains provisions similar in most respects to the Federal Probation Law. In reviewing this matter the Supreme Court of Idaho said (p. 544):

> The court, while clothed with jurisdiction, did not exercise its discretion to suspend the execution of judgment or withhold judgment on such terms and for such time as it might prescribe, but made and entered its final judgment, and after its jurisdiction ceased erroneously sought to exercise the power of the board of pardons.

The Montana Probation Law, Secs. 12078–85, Rev. Codes of 1921, also contains provisions very similar to the Federal Act and in addition, as an aid in clarifying the meaning of the statute, it provides, in regard to revoking the probation, that "In all cases of such termination of probation the original sentence shall be considered as beginning upon the first day of imprisonment in the institution." (Sec. 12084.) In *State ex rel. Reid* v. *District Court*, 68 Mont. 309, the defendant was released by the district court eight days after he was committed to the county jail to serve a six months' sentence. The district court assumed to act under the Proba-

tion Law, but the Supreme Court of Montana, in passing on this case held that it had exceeded its jurisdiction and had encroached upon the powers of the executive. This portion of the decision was reaffirmed in *State ex rel Bottomly* v. *District Court*, 73 Mont. 541, in which the court said (p. 544):

> Independently of other considerations, it is apparent from these provisions that it was the intention of the lawmakers that any order suspending the execution of a sentence should be made before the defendant is committed to the institution wherein his term of imprisonment would have been served but for the order, and to this extent counsel agree.

In *State ex rel. Zabel* v. *Municipal Court of Milwaukee County*, 179 Wis. 195, involving the construction of a State statute almost identical in terms with the Federal Probation Act, the trial court granted probation while the case was pending in the Supreme Court of Wisconsin. The latter court, holding that the trial court had no authority to grant probation, said (p. 2[illegible]):

> It will be seen that the statute does not prescribe the time during which the power of the court to "suspend the judgment or stay the execution thereof and place the defendent on probation" is to be exercised. In view of the prevailing rule, independent of statute, that the court has no power to revise its judgment or sentence after the

term, or after it has become the judgment and sentence of this court, *the language to be found in section 57.01 cannot be construed as indicative of a legislative purpose to authorize an exercise of the power at a time when, under the ordinary powers of the court, it could not revise its judgment or sentence in a criminal case.* Such a legislative purpose should be expressed in clear and definite language. The purpose of the statute was to confer a new power upon the court—the power to suspend the execution of the sentence and place the defendant on probation. *It was not the purpose of the statute to enlarge the time within which a court might revise a judgment or sentence in a criminal case.* (Italics ours.)

CONCLUSION

We find no provision in the Probation Act which authorizes a District Court to release a defendant on probation after he has commenced to serve his jail sentence, and we submit that it was not the purpose of Congress to confer powers in regard to persons already incarcerated which have not been exercised heretofore by the courts and which are forbidden by established rules of procedure. There is no conflict among the Circuit Courts of Appeals which have passed on the point presented here and we think their interpretation of the statute, which would prevent the release of the defendant in the instant case, is the correct one.

The question submitted by the Circuit Court of Appeals for the Eighth Circuit should be answered in the negative.

Respectfully submitted.

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OCTOBER, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 394

THE UNITED STATES OF AMERICA

v.

GLEN MURRAY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 539

FREDERICK A. COOK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

In No. 394, *The United States* v. *Glen Murray*, the decision of the District Court is unreported and there is no opinion of the Circuit Court of Appeals, as the case came here on certificate. In No. 539, *Frederick A. Cook* v. *The United States*, the opinion of the District Court (R. 17) is unreported,

and the opinion of the Circuit Court of Appeals (R. 51) appears in 19 F. (2d) 826.

JURISDICTION

No. 394, the *Murray Case*, came here on certificate, under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925. On October 27, 1927, this Court ordered that the entire record in this cause be certified to it so that the whole matter in controversy might be considered. (R. III.)

In No. 539, the *Cook Case*, the judgment of the Circuit Court of Appeals was entered June 14, 1927. (R. 55.) On September 12, 1927, petition for certiorari was filed under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The writ was granted October 31, 1927. (R. 56.)

Both cases reached the Circuit Court of Appeals on writs of error sued out by the United States to review orders of the U. S. District Court granting probation. Sec. 128(a), Judicial Code (U. S. C., Title 28, Sec. 225); *Stroheim* v. *Deimel*, 77 Fed. 802; *Crooker* v. *Knudsen*, 232 Fed. 857; *United States* v. *New York Central & H. R. R. Co.*, 164 Fed. 324; *United States* v. *Dunne*, 173 Fed. 254, 257.

QUESTIONS PRESENTED

In the *Murray Case* the question is:

Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, known as the Probation Act, during the term at which sentence was imposed, but

after he had commenced to serve the sentence, to make the order placing defendant in error upon probation?

In the *Cook Case* the question is whether the District Court had power to make such an order after the expiration of the term of court at which the mandate of the Circuit Court of Appeals was received, and after service of sentence was commenced.

THE STATUTE

Sections 1 and 2 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1259 (U. S. C., Title 18, Secs. 724, 725), provide:

> SEC. 1. That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together

with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

The record in the *Murray Case* discloses that on October 22, 1926, in the District Court of the United States for the District of Nebraska, defendant in error pleaded guilty to certain violations of the National Prohibition Act. On October 25, 1926, he was sentenced under the plea of guilty to a term of three months' imprisonment in the Douglas County jail at Omaha, Nebraska. On the 25th day of October, 1926, he was delivered by the United States marshal, in pursuance of the judgment and sentence, to the jail keeper, and on that date he commenced serving his sentence. On October 26, 1926, and during the same term of court, the court entered an order placing the defendant in error on probation. (R. 5-7.)

Defendant in error was thereupon released and placed on probation.

It does not appear that any probation proceedings had been instituted or were pending before Murray was committed or prior to October 26th. The United States sued out a writ of error.

In the *Cook Case* petitioner was convicted on November 21, 1923, in the District Court for the Northern District of Texas on a charge of violating Section 215 of the Penal Code (U. S. C., Title 18, Sec. 338), and was sentenced to serve 14 years and 9 months in the Leavenworth Penitentiary, and to pay a fine of $12,000. (R. 1, 5.) Conviction was affirmed by the Circuit Court of Appeals for the Fifth Circuit in February, 1925, and in April of

1925 petitioner was taken from the Tarrant County Jail, where he had been incarcerated pending his appeal, and committed to the Federal Penitentiary at Leavenworth. (R. 2.) In February of 1927 petitioner filed an application in the District Court for probation. (R. 1–4.) The District Court, assuming to act under authority of the Probation Act of March 4, 1925, granted the application on March 17, 1927, ordered that the petitioner be placed on probation for a period of five years, and suspended execution of both the imprisonment and the fine. (R. 7–8.) The order of the District Court was later reversed by the Circuit Court of Appeals, where the case was taken on writ of error. (R. 55–56.) Petitioner now seeks further review of his case on writ of certiorari issued by this Court.

SPECIFICATION OF ERROR IN MURRAY CASE

The United States District Court erred in holding that it had authority to grant probation after Murray had been committed and had entered upon the service of his prison sentence and erred accordingly in granting probation. (R. 8.)

SUMMARY OF ARGUMENT

The *Murray Case* is not moot. If the probation order in the latter case is void, it seems that the defendant may be recommitted; but if this be not so, there is still substance to the case, as its decision will determine whether continued supervision and

partial restraint under probation must be continued until 1928.

The Probation Act does not confer upon the District Courts the power to release a defendant on probation after he has commenced to serve his sentence, and the exercise of such power is contrary to established rules of procedure and is in contravention of the clear meaning of the statute and the purpose for which it was passed.

Prior to the enactment of the Probation Act the Federal courts had long observed the well-known rule of law which prohibits a valid sentence from being set aside or altered, even during the term at which it is imposed, after the defendant enters upon the service of it. As the Probation Act contains no provision which would modify this rule, it applies here and is of itself sufficient to prevent the District Court from releasing the defendant on probation.

The wording of the statute is in harmony with the rule just referred to, for although there is no definite expression as to time given, the language used actually confines the time when a person may be placed on probation to the period between conviction and commitment. The language of the statute also gives effect to its purpose, which, according to the report of the House Judiciary Committee (House Report No. 1377, 68th Congress, 2d Sess., p. 2), is to provide a system of probation in the Federal District Courts and thereby give "an opportunity to reform to certain offenders without the

hardship, the expense, and the risk of subjecting them to imprisonment." As the report points out, the Act is the direct result of the decision of this Court in *Ex parte United States*, 242 U. S. 27, holding that a Federal court had no power to suspend a sentence, and is complementary to the Parole Act and other existing laws which were inadequate to meet the situation, and should not be construed to cover the same field to any extent.

All the decisions rendered by the Circuit Courts of Appeals, and all others by District Courts except in the instant cases and one other, which touch on the questions here presented, support the contention of the Government or are consistent with it, and these Federal decisions are in accord with State cases arising in States where the probation laws are similar to the Federal statute.

The fact that the term has expired, at which sentence was imposed or mandate of an appellate court filed, may not deprive the court of power to grant probation, provided the service of sentence has not commenced and the convicted person is still in the custody of the court awaiting commitment and execution of his sentence.

ARGUMENT

I

THE MURRAY CASE IS NOT MOOT

There is no question as to the *Cook Case* being a proper one for the consideration of this Court, but at the threshold of the *Murray Case* we are con-

fronted with a question as to whether the latter may not be moot in the Circuit Court of Appeals. The record shows that the defendant was sentenced on October 25, 1926, to a term of three months' imprisonment. In the judgment it was provided that the sentence should run from October 25, 1926. (R. 5.) Defendant entered the jail and began to serve his sentence on October 25, 1926. On October 26th he was released on an order issued that day by the District Judge placing him on probation for two years in the custody of a probation officer, and he has continuously since remained under the control of that officer. The period of his sentence, if computed from the date set by the District Court, October 25, 1926, has long since expired, but the law seems to be that a date mentioned in the sentence as the time when that sentence is to begin is not, strictly speaking, a part of the sentence. *Bernstein* v. *United States*, 254 Fed. 967 (certiorari denied, 249 U. S. 604).

The case is not moot if the defendant may be recommitted to jail to serve the remainder of the sentence imposed because the order for probation was void. To sanction such recommitment it must be assumed that as the defendant's sentence was interrupted by a void order, and he has been at large in a void probationary custody, he may be recommitted under the doctrine of "constructive escape." The authorities on that subject are by no means uniform. The line of demarcation between them is discussed in the case of *Morgan* v. *Adams*,

226 Fed. 719, where the Circuit Court of Appeals for the Eighth Circuit said (p. 721):

> * * * it is sufficient to say that the conclusion forced upon our minds is that, if the order suspending such a sentence is illegal, it is so not because it is irregular or technically defective, but because it is beyond the power of the court, and it is therefore void, and the sentence stands, and is enforceable by the court at any time after its rendition, either before or after the term of the court, *until the convict has suffered the penalties it imposes.* (Italics ours.)

The following comment from *State* v. *Abbott*, 87 S. C. 466, 473, is pertinent:

> The reasoning of the cases first cited we think sophistical, because it rests upon the false assumption that a sentence necessarily begins to run and to be satisfied the moment it is pronounced. The execution of a sentence may be postponed by appeal, by escape *and by other causes*, but the time of delay in the execution is not counted as a part of the time of imprisonment fixed by the sentence. No more can the delay due to the release of the convict under a void order of the Court attempting to suspend the sentence be so counted. The sentence is satisfied, not by the lapse of time after it is pronounced, *but by the actual suffering of the imprisonment imposed by it.* The rule is that jurisdiction remains in a Court to enforce its valid judgments according to law against those who are parties to them * * *. The follow-

> ing cases hold that, as the attempt to suspend was of no effect, the sentence is not satisfied until it has been actually suffered. *Neal* v. *State* (Ga.), 30 S. E. 858; *Gray* v. *State* (Ind.), 8 N. E. 16; *Miller* v. *Evans*, 91 Am. St. 143 (Iowa); *State* v. *Cockerham*, 24 N. C. 204. (Italics ours.)

In *Steere* v. *Field*, Fed. Cas. No. 13350 (2 Mason, 486), Justice Story, on circuit, considered the doctrine of constructive escape in deciding whether at common law it constituted an escape for the "gaoler" to allow prisoners the liberty of all the compartments within the jail walls. After an exhaustive review of historical authorities, which he said he "felt necessary, because there is a diversity of opinion among American judges, as to what the common law on this subject is," Justice Story applied the test whether in each case the prisoner is "kept *in salva et arcta custodia*." He decided that giving a prisoner free access to all compartments within the prison walls was not a constructive escape, since that would still be safe and close custody, but that giving the prisoner the keys of the institution and the position of assistant custodian did constitute a constructive escape.

If the order releasing Murray on probation was void, then it follows that the restraint imposed upon him by the probation officer in execution of said order was also void. As a consequence the prisoner would be deemed to have been "at large"; the doctrine of constructive escape would apply to

the period since October 26th and his prison sentence would be considered as having been interrupted during the time he was released under the void probation order so that now he could be returned to suffer the penalties his original valid sentence imposed.

In the case of *Anderson* v. *Corall*, 263 U. S. 193, it is said (p. 196):

> Mere lapse of time *without imprisonment or other restraint contemplated by the law* does not constitute service of sentence. Escape from prison interrupts service, and the time elapsing between escape and retaking will not be taken into account or allowed as a part of the term. *Dolan's Case*, 101 Mass. 219, 222; *Petition of Moebus*, 73 N. H. 350, 352. (Italics ours.)

But in deciding whether the case is moot it may not be necessary to decide whether the defendant may be recommitted. Even upon the assumption that the doctrine of constructive escape may not be invoked herein so as to return Murray to jail to serve the balance of the sentence, it would still seem that enough substance remains in this litigation to justify a decision of the case by this Court. The prisoner is still under the restraint of probation and is required to report at intervals to the probation officer, who is an agent of the court. From time to time this officer expends money in performing the duties of supervision over the prisoner. If the order for probation is void, this supervision

should cease. Substantial rights of the prisoner are also involved in determining the validity of the District Court's order. If he violates the terms of the probation he may be arrested without a warrant by the probation officer, and be brought before the court who can revoke the probation and can give him "any sentence which might originally have been imposed," or the court can extend such supervision over him for a period of five years from October 26th. By the express terms of the order of probation the Government has responsibility for this prisoner until October 26, 1928. If the order of probation is void, then the prisoner should either be freed and the Government's responsibility over him cease or he should be recommitted to jail.

II

THE LIMITATION ON THE POWER OF A FEDERAL COURT TO ALTER A SENTENCE AFTER EXECUTION HAS COMMENCED HAS NOT BEEN CHANGED BY THE PROBATION ACT

Prior to the passage of this Act, the law was well settled that the courts' power of control over defendants ended at the hour of commitment. The general rule, long observed by both the State and Federal courts, is stated by the Circuit Court of Appeals for the Eighth Circuit in *Stewart* v. *United States*, 300 Fed. 769, decided June 12, 1924 (p. 777):

> An examination of the authorities leaves no doubt that the established rule is that

> courts have the jurisdiction and authority, during the term at which their orders, judgments, and decrees are made, to set them aside and substitute others for them, or to amend or otherwise modify them, *until or unless they have been executed in whole or in part*, or the rights of third parties will be injured by such action, and cases in which pleas of nolo contendere have been filed and accepted by the court are not exceptions to this rule. (Italics ours.)

This rule was also discussed by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Howe*, 280 Fed. 815, which held (p. 819):

> • • • while a court has, as a general rule, power over its judgments during the term, its power over them is clearly subject to certain restrictions. Thus it has been held that, after a sentence has been pronounced, but before the final judgment has been signed, the court may change the sentence. • • • *Ex parte Lange* itself clearly indicates one of such restrictions. And another restriction is that if a sentence has been put into operation, and the person sentenced to imprisonment has been actually committed to prison and commenced to serve his term, the power of the court to alter or amend the sentence is gone.

In *Ex parte Lange*, 18 Wall. 163, cited in the above decision, this Court held that a second judgment could not be rendered even during the same term or when the first was erroneous if the sentence was partially executed.

The Probation Act has enlarged the powers of the courts in regard to the disposition of defendants, but, as its wording indicates, this grant of power is to be executed only "after conviction or after a plea of guilty," which plainly is just an enlargement of the courts' range of discretion in sentencing, and not a shift of the courts' authority beyond the ancient natural limit. To give the latter construction to the Act would be to impute to Congress an intent to create a region of overlapping authority between the courts and the executive. Such a construction is unnecessary to the effectiveness of the Probation Act, and it is unlikely that Congress intended to create a period during which both the executive and the courts could deal with defendants.

There must be a definite limit to the power of the judiciary, and it is a part of our law that this limit be placed at the prison door. The line of demarcation between the judicial and executive branches of the Government is very well stated in the following excerpt from *Miller* v. *Snook*, 15 F. (2d) 68, 69:

> * * * Discretion is given the courts in fixing punishment before execution begins, but after execution commences the prisoner is considered to be beyond the power of the court and in the hands of the executive. The rights of prosecution and prisoner then become fixed. By losing possession of the prisoner, the court loses control of his case,

unless control is resumed by some proper proceeding, such as a motion for a new trial or a habeas corpus. The executive may afterwards commute or pardon, but the judge can do neither. Yet the effect of his then altering or reducing the sentence would be commutation or pardon to that extent.

Considering our frame of government, it would seem that the power of the court should logically end when the prisoner passes into the custody and control of the executive under a legal and valid sentence. The commitment is the document which marks the surrender by the court to the executive of the prisoner. It is issued by the clerk of the court to the keeper of the prison and in the name of the President, and authorizes the prison keeper to receive and hold the prisoner. In a jail sentence, when a prisoner is actually committed to jail, unquestionably he is in the hands of the executive for the execution of that sentence.

With this division of powers between the judiciary and the executive so well established as a part of our law, it is unreasonable to hold that the Probation Act, with no provisions inconsistent with this division of powers, has worked a change in this respect and was intended to confer authority on the courts to exercise powers which have heretofore been considered executive in their nature. Such a construction would raise a serious constitutional question. In regard to this, when a similar question arose in *Archer* v. *Snook*, 10 F. (2d) 567, it was said (p. 568):

> The limitations on the power of the court to alter a sentence, even during the term, when it has gone into execution, are well recognized. See 12 Cyc. 783; *In re Lange*, 18 Wall. 163, 21 L. Ed. 872. The interference by a judge with a closed sentence, after the prisoner has been delivered in execution to the executive authority, is at least so close to an exercise of the pardoning power, which is held to include commutations and conditional pardons (*United States* v. *Wilson*, 7 Pet. 150, 8 L. Ed. 640; *In re Wells*, 18 How. 307, 15 L. Ed. 421), that it should not be attempted, unless on the clearest legislative warrant.

Plainly Congress intended in the Probation Act to confer upon the courts enlarged discretionary powers to weigh the interests of society and the defendant in the imposition of punishment, but supplementary to and not intrusive upon the executive's power to pardon or parole.

III

NEITHER THE LANGUAGE OF THE PROBATION ACT WHEN CONSIDERED AS A WHOLE NOR THE DECLARED PURPOSE OF CONGRESS IN PASSING IT IS CONSISTENT WITH THE GRANTING OF PROBATION AFTER COMMITMENT

(*A*) *Consideration of the Language of the Statute*

Although the Probation Act does not contain a definite expression as to the length of time after conviction in which a court may grant probation, the language used plainly indicates that the power

does not extend beyond the time of commitment. Section 1 of the Act provides that "after conviction or after a plea of guilty or nolo contendere" the court shall have power "to suspend the imposition or execution of sentence and to place the defendant upon probation." The language of this provision forestalls the contention that the Act contains no terms limiting the time, for the words used are in themselves a limitation.

In both of these cases the District Courts have apparently construed the statute as if it read "the court shall have power to suspend the execution of the whole sentence or a part thereof." There is no reason for reading such a provision into the law, and there is, in fact, good reason to believe that Congress purposely omitted all references to the whole or part of the sentences. It is a matter of record that the New York Probation Law was one of the laws studied by Congress in drafting the Federal law. (House Report No. 1377, 68th Congress, 2d Sess., p. 3.) At that time the New York law did contain a provision for suspending execution of the whole or a part of the judgment. Such provision was apparently the source of much confusion and the cause of an amendment in 1920 providing "that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced." (Sec. 2188, N. Y. Criminal Code, 1924.) The amendment really nullified the effect of the provision referred to above, and in 1925, but after the Federal law was

passed, the New York law was amended to omit such references entirely. It seems safe to assume that Congress did consider these provisions, which were then in the law, and deliberately left them out of the Federal law.

Therefore, in the absence of any qualifying words, we contend that the word "sentence" is to be taken as a unit and that probation must be granted before any part of the prison sentence is executed. The Government's view is expressed by the District Court of Kansas in *Mouse* v. *United States*, 14 F. (2d) 202, 203:

> Does this language mean the further execution of a sentence being served may be suspended at any time before the same has been fully performed? If so, then all convicts may, at any time during the period of the term of confinement in prison, make the application.
>
> I am forced to the conclusion this view of the act is not that expressed or intended by the Congress; on the contrary, that the suspension of the imposition or execution of sentence as by Congress intended was *applicable to that period between conviction and the beginning of the execution of sentence*, at which the court has retained jurisdiction over the cause and the power to change or modify its judgment of conviction, and that it was not the view of the lawmaking power the Probation Act in question should permit the court to invade the penal institutions of the country at any time during the term of

> imprisonment, and after all jurisdiction over the subject matter and the person of the offender has been lost. (Italics ours.)

The language used in other portions of the Act also supports this view. The following alternative clauses, which appear in Section 1 of the Act, imply that Congress is not authorized to make partial execution of a prison sentence a condition of probation:

> That the courts * * * shall have power * * * to suspend the imposition or execution of sentence and to place the defendant upon probation * * * or *the court may impose a fine and may also place the defendant upon probation in the manner aforesaid.* (Italics ours.)

In commenting on these alternative clauses the District Court for the Northern District of Georgia in *Archer* v. *Snook, supra*, said (p. 569):

> This broad language might have been considered sufficient to permit making the payment of a fine or the suffering of an imprisonment one of the conditions of the probation. But that such was not the meaning of Congress appears from the immediately following words: Or "may impose a fine and may *also* place the defendant upon probation *in the manner aforesaid.*" This makes it clear that probation *"in the manner aforesaid"* could not have included the payment of a fine. Much less could it include an imprisonment, to prevent which, in proper cases, was the main object of the law. Suc-

ceeding sentences of the law mention a variety of things which may be required of the probationer, but imprisonment is not among them. It may come only on revoking the probation. The court, therefore, after ascertainment of guilt, must, with no other delays than have heretofore been permissible, either suspend sentence and establish probation, which may, if unsuccessful, be revoked and sentence then pronounced, or may pronounce the sentence ordinarily appropriate to the offense, but before it goes into execution may suspend it, and establish in lieu of it probation, subject to revocation and execution of the sentence later. It may, by express provision of the act, in any probation, make the payment of a fine a condition of it, but in none may it make imprisonment under the sentence such. It can not, therefore, impose an imprisonment sentence, and provide for its suspension and for probation after it is partly executed. This applicant, therefore, can not have his discharge on the attempt to provide therefor in this sentence, but must place his case before the parole board.

If the statute prohibits a court, as is indicated in these alternative clauses, from making a partial execution of a prison sentence a condition of probation, it can hardly be urged that a court is allowed to accomplish the same result by deferring the announcement of probation until after the sentence has been partially executed.

The statute contains still another reference which is of assistance in determining the time when pro-

bation may be granted. The power to impose a fine and to grant probation contained in one of the alternative clauses quoted above is given without any definite expression as to the time these powers may be exercised; but it seems clear that Congress intended the fine and probation to be given simultaneously, as is indicated in the following provision, also in Section 1:

> While on probation the defendant may be required to pay in one or several sums *a fine imposed at the time of being placed on probation* * * *. (Italics ours.)

The language of the foregoing provisions precludes the Act from being construed to apply to persons already incarcerated.

(B) The Purpose of Congress in Passing the Probation Act

In a memorandum prepared by the National Probation Association and attached to the report of the House Judiciary Committee when the bill was presented in its final form (House Report No. 1377, 68th Congress, 2d Sess., p. 2), the purpose of the Act is stated as follows:

> The purpose of this bill is to provide a system for the use of probation in the United States district courts in line with statutes now in effect in a large majority of the States. * * *
>
> Probation is the method by which the court disciplines and gives an opportunity to reform to certain offenders *without the hard-*

ship, the expense, and the risk of subjecting them to imprisonment. * * *

* * * It frequently happens that the same or a similar offense is committed by a hardened repeater who is deserving of no mercy at the hands of the court, and by a young boy, a first offender who has been led into crime by evil associates or bad environment, who after his detention and trial is thoroughly repentant and capable of becoming an upright citizen if extended a helping hand upon his release. In many such cases probation is not only the humane but the practical and effective treatment, *avoiding the disgrace and stigma of a prison sentence.* * * *

Before the decision of the United States Supreme Court in the so-called Killits case, rendered in December, 1916 (Ex parte U. S. Petitioner, No. 11, original), the United States district courts suspended sentence in many instances * * *.

As a result of the decision of the Supreme Court bills for this purpose have been introduced in Congress at each session since. * * *

The United States district courts, unlike nearly all State courts, have to-day absolutely no legal power to suspend sentence or use probation. * * * In extreme cases of children and young first offenders, where removing them from a good home and sending them to a penal institutiton seems unnecessarily drastic, and where a fine can not be paid, certain judges now adjourn these

cases for an indefinite period, requiring them to report at stated times to an officer of the court. * * *

The parole laws and pardoning power of the President are not adequate to meet the need for a probation system. Under the parole law the defendant must be committed and serve at least one-third of the sentence in full. This usually means six months' sentence, and always means the branding of the delinquent as a convict and taking him away from his environment and associates in disgrace. The result of long experience with the probation system shows that it is far easier *to reclaim an unhardened early offender without commitment to a prison than after it*. The presidential power of pardon is subject to the same criticism and can naturally only be exercised in special cases. * * * (Italics ours.)

This bill is modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work. Its principal provisions are as follows:

SECTION 1. *Suspension of sentence and placing on probation.*—The United States courts of original jurisdiction are authorized to suspend sentence and place offenders on probation in all cases except those punishable by death or life imprisonment. * * *

This shows that Congress when enacting this statute had in mind defendants who had not yet been committed, and that it intended the Probation Act to be complementary to the Parole Act, which

was inadequate to meet the situation. Therefore, to hold that the Probation Act was designed to give relief to prisoners is to deny the true purpose of the Act, for as it was said in *Archer* v. *Snook, supra,* (p. 568):

> By their incarceration, the shame, stigma, and criminal contact, which the probation system sought in proper cases to avoid, will have already been accomplished.

IV

THE DECISIONS ON THE QUESTION OF ALLOWING THE RELEASE OF A PRISONER ON PROBATION AFTER HE HAS COMMENCED TO SERVE HIS SENTENCE SUPPORT THE CONTENTION OF THE UNITED STATES

All of the decisions of the Federal courts, except those of the United States District Courts in these cases and one other in a District Court, touching on the question presented here, are either in support of the Government's contention or are consistent with it. None of the decisions rendered by Circuit Courts of Appeals are opposed to the Government's views.

Nix v. *James*, 7 F. (2d) 590, decided by the Circuit Court of Appeals for the Ninth Circuit on August 3, 1925, was the first reported case arising under this statute and does not touch on the point raised here, except indirectly in the following statements (pp. 593, 594):

> In other words, defendants sentenced at terms * * * prior to March 4, 1925, and who have not yet been imprisoned, may come

> within the mischiefs which Congress intended to remedy * * *.
>
> * * * * *
>
> Nothing contained in this opinion must be construed as holding that the Probation Act has any application to a defendant who has entered on the service of his term of imprisonment.

In *Kriebel* v. *United States*, 10 F. (2d) 762, the Circuit Court of Appeals for the Seventh Circuit stated that the question whether the Probation Act was applicable to a defendant who had begun the service of his term of imprisonment was not before it.

In *Evans* v. *District Judge of the United States for the Western District of Tennessee*, 12 F (2d) 64, the Circuit Court of Appeals for the Sixth Circuit explained that the record did not show whether the defendant had begun to serve his sentence, but the court said (p. 65):

> We think that jurisdiction to grant probation exists, even as to convictions made and affirmed before March 4, 1925, at least at any time before the execution of the sentence is begun * * *.

In *Ackerson* v. *United States*, 15 F. (2d) 268, the Circuit Court of Appeals for the Second Circuit said (p. 269):

> It is held to be reasonably clear that Congress did intend to permit persons convicted of crime to apply for the benefit of the statute at any time before actually entering upon the performance of the sentence or judgment of the trial court * * *.

There are six reported decisions by District Courts involving the questions presented here. Five of these take the view advanced by the Government in this brief. In the sixth, *United States* v. *Chafina*, 14 F. (2d) 622, the District Court for Arizona placed the defendant on probation after she had served about sixteen months of her sentence. The court said (p. 623):

> It is suggested that the exercise of this power by the court would be in conflict with the Parole Act. Assume that to be true. Congress passed both Acts. It could modify or repeal the Parole Act at its pleasure. The Probation Act was passed subsequent to the passage of the Parole Act and clearly vests this discretionary power in the court, as no limitation of time after which the court may not admit to probation is expressed in the act.

In regard to the repeal of prior laws and in reply to the statement in the *Chafina Case*, the District Court for the Western District of Arkansas said in *Davis* v. *United States*, 15 F. (2d) 697, 700:

> The statement that Congress may modify or repeal the Parole Act at its pleasure is true. There is in the Probation Act no express repeal or modification of the Parole Act. Implied repeals are not favored. If Congress had desired the Probation Act to repeal or modify the Parole Act, or to give to the District Court authority to release a defendant confined in a United States penitentiary outside of the territorial jurisdic-

> tion of the court and after the expiration of the term at which the defendant was convicted, it seems to me that Congress would have so stated in express terms.

In the *Davis Case* the defendant's petition was denied on the grounds that the term of court at which the sentence was imposed had passed and that he was already serving his sentence in Leavenworth Penitentiary. In three of the four remaining cases—*Archer* v. *Snook, supra; Mouse* v. *United States, supra;* and *United States* v. *Young,* 17 F. (2d) 129—the defendants had also commenced to serve their sentences, and all were denied probation for that reason. In *United States* v. *Davis,* 19 F. (2d) 536, decided by the District Court for Idaho, the defendant had not yet been committed, and the court stated that, in view of that fact, it still had power to grant probation.

Decisions of the New York State courts are in point, as the New York probation statute was one of the laws used as a model for the Federal law. (See Report of the House Judiciary Committee, *supra.*) The provisions of the New York law in effect at the time the Federal statute was enacted are, in part:

> A court * * * may suspend sentence or impose sentence and suspend the execution of the whole or a part of the judgment and may in either case place the defendant on probation in accordance with the provisions of section eleven-a of the code of criminal procedure. * * * Provided, however,

> that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced. (Sec. 2188, Criminal Code, 1924.)

In *People ex rel. Paris* v. *Hunt*, 201 App. Div. 573, affirmed in 234 N. Y. 558, it was held that the reference relative to the "whole or a part of the judgment" did not give the court power to interfere with a defendant's sentence after execution had commenced. In that case the Supreme Court of Washington County gave the defendant an indeterminate sentence with a minimum of two and one-half years, but ordered that he be produced in court after a year's service for final disposition. In regard to this order the Appellate Division of the Supreme Court made the following statement, which was later approved by the Court of Appeals (p. 575):

> Under the record here it must be held that at the time the sentence was imposed and before the imprisonment began there was no modification of this judgment affecting the term of imprisonment imposed, and that any other disposition which could be made in the County Court of Bronx county on producing the defendant there would be a disposition modifying the judgment at that time, after the imprisonment had commenced. Such action, we think, is forbidden by the amendment.

A review of other State decisions also indicates that where the laws are similar to the Federal stat-

ute the decisions lend support to the view advanced herein by the Government.

In *State* v. *Ensign*, 38 Idaho 539, the defendant was released by the district court from jail when he had served only about one-half of his six months' sentence. The court tried to justify its action under Section 9041 of the Compiled Statutes of Idaho, which relates to the suspension of sentences and which contains provisions similar in most respects to the Federal Probation Law. In reviewing this matter the Supreme Court of Idaho said (p. 544):

> The court, while clothed with jurisdiction, did not exercise its discretion to suspend the execution of judgment or withhold judgment on such terms and for such time as it might prescribe, but made and entered its final judgment, and after its jurisdiction ceased erroneously sought to exercise the power of the board of pardons.

The Montana Probation Law, Secs. 12078–85, Rev. Codes of 1921, also contains provisions very similar to the Federal Act and in addition, as an aid in clarifying the meaning of the statute, it provides, in regard to revoking the probation, that "In all cases of such termination of probation the original sentence shall be considered as beginning upon the first day of imprisonment in the institution." (Sec. 12084.) In *State ex rel. Reid* v. *District Court*, 68 Mont. 309, the defendant was released by the district court eight days after he was committed to the county jail to serve a six months'

sentence. The district court assumed to act under the Probation Law, but the Supreme Court of Montana, in passing on this case held that it had exceeded its jurisdiction and had encroached upon the powers of the executive. This portion of the decision was reaffirmed in *State ex rel. Bottomly* v. *District Court*, 73 Mont. 541, in which the court said (p. 544):

> Independently of other considerations, it is apparent from these provisions that it was the intention of the law makers that any order suspending the execution of a sentence should be made before the defendant is committed to the institution wherein his term of imprisonment would have been served but for the order, and to this extent counsel agree.

In *State ex rel. Zabel* v. *Municipal Court of Milwaukee County*, 179 Wis. 195, involving the construction of a State statute almost identical in terms with the Federal Probation Act, the trial court granted probation while the case was pending in the Supreme Court of Wisconsin. The latter court, holding that the trial court had no authority to grant probation, said (p. 200):

> It will be seen that the statute does not prescribe the time during which the power of the court to "suspend the judgment or stay the execution thereof and place the defendant on probation" is to be exercised. In view of the prevailing rule, independent of statute, that the court has no power to revise

its judgment or sentence after the term, or after it has become the judgment and sentence of this court, *the language to be found in section 57.01 can not be construed as indicative of a legislative purpose to authorize an exercise of the power at a time when, under the ordinary powers of the court, it could not revise its judgment or sentence in a criminal case.* Such a legislative purpose should be expressed in clear and definite language. The purpose of the statute was to confer a new power upon the court—the power to suspend the execution of the sentence and place the defendant on probation. *It was not the purpose of the statute to enlarge the time within which a court might revise a judgment or sentence in a criminal case.* (Italics ours.)

V

THE EXPIRATION OF THE TERM AT WHICH SENTENCE WAS IMPOSED OR MANDATE OF APPELLATE COURT RECEIVED MAY NOT DEPRIVE THE DISTRICT COURT OF POWER TO GRANT PROBATION, PROVIDED THE CONVICT HAS NOT BEEN COMMITTED

In each of these cases the prisoner had been committed and had entered upon the service of his sentence before probation was granted. Murray had been in jail only one day and Cook had been in the penitentiary nearly two years before probation was granted, but the principle is the same in either case. There is one feature of the *Cook Case* which is not present in the *Murray Case* which deserves some comment.

In the *Murray Case*, although the prisoner had been committed, the term at which his sentence was imposed had not expired.

In the *Cook Case*, after judgment, the case was taken on writ of error to the Circuit Court of Appeals, which affirmed the conviction. The term of the District Court at which its judgment was entered had expired and the term of that court during which the mandate of the Circuit Court of Appeals was received and entered had expired before probation was granted.

Some decisions deal with the effect of the expiration of the term at which judgment was entered on the power of the District Court to grant probation, in connection with the rule stated in *United States* v. *Mayer*, 235 U. S. 55, that ordinarily a court may not alter its judgment after the expiration of the term unless steps to that end have been commenced during the term. *Nix* v. *James*, 7 F. (2d) 590, C. C. A., 9th Circuit; *Kriebel* v. *United States*, 10 F. (2d) 762, C. C. A., 7th Circuit; *Evans* v. *District Judge of the United States for the Western District of Tennessee*, 12 F. (2d) 64, C. C. A., 6th Circuit; *Ackerson* v. *United States*, 15 F. (2d) 268, C. C. A., 2d Circuit, all hold that, if granting probation be considered the alteration or modification of a judgment, the rule that a judgment may not be modified after the expiration of the term does not operate to prevent the granting of probation after such term has expired, where a writ of error has been sued out by the convicted person, execution of

whose sentence is postponed pending the appeal, and that the Probation Act has modified the old rule respecting the powers of the District Courts to the extent of allowing them to grant probation after affirmance of a conviction by an appellate court, even though the term of the District Court at which the judgment was entered has expired, provided the convict has not begun the service of the sentence and action is taken after the mandate is received and before commitment. The rule announced in these decisions seems to be in accordance with the purpose and spirit of the Probation Act, and these decisions have been accepted by the United States as containing a correct statement of the law. No doubt in all of them the probation was granted during the term at which the mandate of the appellate court was received and entered, while in the *Cook Case* that term had expired, but it is not apparent that any distinction in principle is to be made for that reason.

We see no reason to urge that Congress may not empower a District Court to grant probation after the expiration of the term at which its judgment was rendered and after the expiration of the term at which the mandate of an appellate court may have been received, provided the convict has not commenced service of the sentence and is still in the custody of the court awaiting commitment and execution of sentence. Granting probation relates to the execution of the sentence. The test applied in the decisions of the Circuit Courts of Appeals

last above cited, in determining the power of the District Court to grant probation, is whether the convict still remains in the custody of the court awaiting commitment and execution of his sentence, regardless of the expiration of the term, and this test seems to reflect the purpose of the Probation Act. Having acquiesced in the decisions in the *Nix Case*, and others like it, consistency seems to require that we make no point of the fact that the term had expired at which the mandate of the appellate court was received.

It seems clearly established that probation may not be granted after commitment in any case. That point disposes of both of the cases at bar, and the question arising in the *Cook case* from the fact that the term at which the mandate was received, as well as the term at which the District Court's judgment had been originally entered, had expired, may not require any consideration by the Court. Cases would be exceptional in which commitment is delayed beyond the expiration of the term at which the affirming mandate of an appellate court is received.

CONCLUSION

We find no provision in the Probation Act which authorizes a District Court to release a defendant on probation after he has commenced to serve his prison sentence, and we submit that it was not the purpose of Congress to confer powers in regard to persons already incarcerated which have not been exercised heretofore by the courts and which are

forbidden by established rules of procedure. There is no conflict among the Circuit Courts of Appeals which have passed on the points presented here and we think their interpretation of the statute, which would prevent the release of the defendants in these cases, is the correct one.

The order of the United States District Court in the *Murray Case* should be reversed. The judgment of the Circuit Court of Appeals for the Fifth Circuit in the *Cook Case* should be affirmed.

Respectfully submitted.

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NOVEMBER, 1927.

○

SUPREME COURT OF THE UNITED STATES.

Nos. 394 and 539.—October Term, 1927.

394	The United States of America *vs.* Glen Murray.	On certificate from the United States Circuit Court of Appeals for the Eighth Circuit.
539	Frederick A. Cook, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 3, 1928.]

Mr. Chief Justice Taft delivered the opinion of the Court.

These cases involve the construction of the Act of March 4, 1925, c. 521, 43 Stat. 1259, which provides a probation system for United States Courts.

No. 394 came here by certificate from the Circuit Court of Appeals for the Eighth Circuit and we ordered up the entire record. Section 239 of the Judicial Code, Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

On October 22, 1926, in the District Court of the United States for the District of Nebraska the defendant, Glen Murray, pleaded guilty to certain violations of the National Prohibition Act. On October 25, 1926, he was sentenced to three months' imprisonment at the Douglas County jail, at Omaha. On the same day he was delivered by the United States Marshal, in pursuance of the sentence, to the jail keeper, and commenced serving it. On October 26th, the next day, and during the same term of court, the district court entered an order placing him on probation, which read as follows:

"Ordered and adjudged that said defendant, Glen Murray, be placed on probation for the period of two (2) years, under the personal supervision of Robert P. Samardick, who is hereby appointed and constituted probation officer in this case."

The United States took the case to the Circuit Court of Appeals by writ of error. The question certified to this Court by that court was as follows:

Did the United States District Court for the District of Nebraska have authority under the act of March 4, 1925, 43 Stat. at Large, c. 521, p. 1259, to make during the term at which sentence was imposed the order placing the defendant in error upon probation after he had commenced to serve sentence?

On November 21, 1923, Frederick A. Cook was indicted in the district court of the United States for the Northern District of Texas, he was convicted on twelve counts charging him with using the United States mails in executing a scheme to defraud within section 215 of the United States Criminal Code, and was sentenced by a district judge designated from another district and circuit to a total of fourteen years and nine months and to pay a total fine of $12,000. He was thereafter confined in the county jail of Tarrant County, Texas, where he remained until after his case had been appealed to the Fifth Circuit Court of Appeals, which affirmed the sentence in February, 1925. In April, 1925, he was transported to the United States penitentiary at Leavenworth, Kansas, to serve his sentence, where he has been confined ever since. In February, 1927, he applied to the regular judge of the district where he had been sentenced to enter an order placing him on probation for a period of five years in the care of a special probation officer under the Probation Act. The application was granted on March 17, 1927. The warden of the penitentiary was directed to release Cook from custody, and one W. Erskine Williams was appointed probation officer to whom Cook should report every six months. The record contains an elaborate opinion of the district judge upholding his power to make the order.

Objecting to the order, the United States sued out a writ of error to the district court from the Circuit Court of Appeals. That court held that the Probation Act did not empower the district court to grant probation to Cook, that the power conferred in the act was not exercisable in a case which had passed beyond the court's control by the rendition of a final judgment and the expiration of the term during which such judgment was rendered. 19 Fed. (2d) 826. We brought the case here by a writ of certiorari, Oct. 31, 1927.

The first question which we must consider, and which if we decide in favor of the Government controls both cases and disposes of them, is whether there is any power in the Federal courts of first instance to grant probation under the Probation Act, after the defendant has served any part of his sentence. The Probation Act, 43 Stat. 1259, c. 521, provides in its first and second sections as follows:

"That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years.

"While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

"Sec. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may impose any sentence which might originally have been imposed."

Its subsequent sections provide for the appointment of one or more suitable persons to serve as probation officers and for their

compensation and expenses, make it the duty of the probation officer to furnish to the person released a written statement of the conditions of probation, to keep informed concerning the conduct and condition of each person on probation, and report it to the court, to aid the persons on probation and to bring about improvements in their conduct and condition; to keep records of his work, accounts of the moneys collected from persons under his supervision, and give receipts therefor and make monthly returns thereof and to have the same power of arrest as is now exercised by a deputy marshal. The fifth section makes the act to take effect immediately.

The report of the Committee on the Judiciary of the House of Representatives recommending the bill which became the act, (Report No. 1377, 68th Congress, 2d Session), stated its purpose and continued:

"Prior to the so-called Killitts case, rendered in December, 1916, the district courts exercised a form of probation either by suspending sentence or by placing the defendants under State probation officers or volunteers. In this case, however (ex-parte United States, 242 U. S. 27), the Supreme Court denied the right of the district courts to suspend sentence. In the same opinion the court pointed out the necessity for action by Congress if the courts were to exercise probation powers in the future. The language of the court is as follows:

"'So far as the future is concerned . . . recourse must be had to Congress, whose legislative power on the subject is, in the very nature of things, adequately complete'.

"Since this decision was rendered, two attempts have been made to enact probation legislation. In 1917, a bill was favorably reported by the Judiciary Committee and passed the House. In 1920, the Judiciary Committee again favorably reported a probation bill to the House, but it was never reached for definite action.

"If this bill is enacted into law, it will bring the policy of the Federal Government with reference to its treatment of those convicted of violations of its criminal laws in harmony with that of the States of the Union. At the present time every State has a probation law, and in all but 12 states the law applies both to adult and juvenile offenders."

The report contains a memorandum in support of the bill, of which the following are passages:

"Probation is the method by which the court disciplines and gives an opportunity to reform to certain offenders without the hardship, the expense, and the risk of subjecting them to imprisonment. . . .

"It frequently happens that the same or a similar offense is committed by a hardened repeater who is deserving of no mercy at the hands of the court, and by a young boy, a first offender who has been led into crime by evil associates or bad environment, who after his detention and trial is thoroughly repentant and capable of becoming an upright citizen if extended a helping hand upon his release. . . .

"The parole laws and pardoning power of the President are not adequate to meet the need for a probation system. Under the parole law the defendant must be committed and serve at least one-third of the sentence in full. This usually means six months' sentence and always means the branding of the delinquent as a convict and taking him away from his environment and associates in disgrace. The result of long experience with the probation system shows that it is far easier to reclaim an unhardened early offender without commitment to a prison than after it. The presidential power of pardon is subject to the same criticism and can naturally only be exercised in special cases."

By the Act of June 21, 1902, c. 1140, 32 Stat., 397, sec. 1, every person convicted of an offense against the United States and confined in the penitentiary or jail for a definite term, having faithfully observed all the rules, becomes entitled to a deduction of five days for each month of the first year of his imprisonment, and for the period between one year and three, of six days, and increasing allowances therefor until it reaches ten days for each month in a sentence of ten years or more.

The Probation Act gives power to grant probation to a convict after his conviction or after a plea of guilty, by suspending the imposition or suspending execution of the sentence. This probation is to be after conviction or plea of guilty. The question is—Before what time must it be granted? Two answers to this latter question are possible. It must be grantable either at any time during his whole sentence or be limited to a time before execution of the sentence. If the first answer is adopted, it would confer very comprehensive power on the district judges in the exercise of what is very like that of executive clemency in all cases of crime or misdemeanor. It would cover in most cases the period between the imposition of the sentence and the full execution of it. It would cover a period in which not only clemency by the President under the Constitution might be exercised but also the power of parole by a Board of Parole abating judicial punishment to the extent of two-thirds of it as to all crimes punishable by imprison-

ment for more than one year. It seems quite unlikely that Congress would have deemed it wise or necessary thus to make applicable to the same crimes at the same time three different methods of mitigation.

Nor can we suppose that Congress would wish to grant such extended power in all but life and capital cases to the district judges and thus subject each to the applications of convicts during the entire time until the full ending of the sentences. This would seem unnecessary for the hard worked district judges with their crowded dockets. A more reasonable construction is to reconcile the provisions for probation, parole and executive clemency making them as little of a repetition as we can. Executive clemency must of course cover every form of relief from punishment. The parole statute provides a board to be invested with full opportunity to watch the conduct of penitentiary convicts during their incarceration and to shorten it not only by the regular monthly reduction of days but by a larger diminution by parole.

What was lacking in these provisions was an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance before actual imprisonment should stain the life of the convict. This amelioration had been largely furnished by a power which trial courts, many of them, had exercised to suspend sentences. In some sections of the country it had been practiced for three-quarters of a century. By the decision in *Ex parte United States*, 242 U. S. 27, that remedy was denied. In that case however, this court suggested legislation to permit probation. For eight years thereafter Congress was petitioned to enact it, and finally the Probation Act was passed.

The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real *locus poenitentiae* between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at time of sentence was

therefore the period to which the advocates of a Probation Act always directed their urgency. Probation was not sought to shorten the term. Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence. The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte Lange*, 18 Wall. 163. Such a limit for probation is a natural one to achieve its end.

The words of the first section important upon this issue are "shall have power, after conviction or after a plea of guilty or nolo contendere, . . . to suspend the imposition or execution of sentence and to place the defendant upon probation". The words mean to suspend the imposition of sentence or to suspend the execution of sentence, and that the placing of defendant upon probation is to follow the suspension of the imposition or the suspension of the execution of sentence, without an interval of any part of the execution. That is a reasonable construction and serves the well understood purpose of the statute. The suspension of execution was the point in time to which the provision for probation was directed. We do not say that the language is not broad enough to permit a possibly wider construction, but we think it not in accord with the intention of Congress.

This Act has been before courts of first instance and Circuit Courts of Appeal a number of times, but we have found only one reported case, in addition to the decisions by the district courts in the instant cases, in which it has been held that probation may be granted after the service of the sentence has begun. That case is *United States* v. *Chafina*, 14 Fed. (2d) 62%, a district court case. The other cases brought to our attention are not inconsistent with our ruling. *Nix* v. *James, District Judge*, 7 Fed. (2d) 590; *Kriebel* v. *United States*, 10 Fed. (2d) 762; *Evans* v. *District Judge for the Western District of Tennessee*, 12 Fed. (2d) 64; *Ackerson* v. *United States*, 15 Fed. (2d) 268; *Davis* v. *United States*, 15 Fed. (2d) 697; *United States* v. *Young*, 17 Fed. (2d) 129; *United States* v. *Davis*, 19 Fed. (2d) 536.

With this interpretation of the statute it must be decided that the district court neither in the *Glen Murray* case nor in the *Cook* case had power to grant probation. It is true that there

was but one day of execution of the sentence in the *Murray* case, but the power passed immediately after imprisonment began and there had been one day of it served. The cause is remanded to the district court with instructions to reverse the order placing Murray upon probation and for further proceedings. In the *Cook* case the action of the Circuit Court of Appeals reversing the order of the district court of the United States for the Northern District of Texas granting to Cook probation is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.